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Supreme Court of the United States

OCTOBER TERM, 1911.

GEORGE T. SIMPSON ET AL., APPELLANTS,
vs.
DAVID C. SHEPARD.
No. 289 291

GEORGE T. SIMPSON ET AL., APPELLANTS,
vs.
EMMA B. KENNEDY, ROBERT ELIOT TOD, ROBERT W. DE FOREST, and WILLIAM STEWART TOD, Executrix and Executors of the Will of JOHN S. KENNEDY, Deceased, and HENRY A. JAMES.
No. 608 292

GEORGE T. SIMPSON ET AL., APPELLANTS,
vs.
WILLIAM SHILLABER.
No. 608 293

BRIEF ON BEHALF OF APPELLEES.

CHARLES W. BUNN.

POOR COPY

Supreme Court of the United States

OCTOBER TERM, 1911.

GEORGE T. SIMPSON ET AL., APPELLANTS,

vs.

DAVID C. SHEPARD.

No. 599.

GEORGE T. SIMPSON ET AL., APPELLANTS,

vs.

EMMA B. KENNEDY, ROBERT ELIOT TOD, ROBERT W. DE FOREST, and WILLIAM STEWART TOD, Executrix and Executors of the Will of JOHN S. KENNEDY, Deceased, and HENRY A. JAMES.

No. 600.

GEORGE T. SIMPSON ET AL., APPELLANTS,

vs.

WILLIAM SHILLABER.

No. 601.

BRIEF ON BEHALF OF APPELLEES.

In the year 1906 the Northern Pacific Railway Company, the Great Northern Railway Company and the Minneapolis & St. Louis Railroad Company were carrying passengers and freight within, through and without the state of Minnesota for legal fares, rates

and charges, which had been established, filed and published in accordance with the act of Congress regulating commerce among the states. These fares, rates and charges were found by the court below (and this will not be questioned) to have been fair and undiscriminatory as compared with transportation rates on local traffic moving wholly within the state of Minnesota.

On September 6, 1906, the Railroad and Warehouse Commission of Minnesota ordered reduction of all rates within the state on general merchandise (these are known as class rates and include classes 1, 2, 3, 4, 5, A, B, C, D, and E). This reduction was from 20 to 25 per cent below rates then in force. By a supplemental order the Commission ordered a further reduction of the same rates into certain distributing or jobbing towns. On April 4, 1907, the state Legislature passed an act reducing passenger fares within the state from three cents to two cents, and on April 18, 1907, it passed an act making an average reduction of 7.377 per cent in what are known as commodity rates, that is, rates on staples such as grain, flour, lumber, coal, and live animals. The laws of Minnesota required the carriers to make these rates effective, under severe and unconstitutional penalties. *Ex parte Young*, 209 U. S. 123; General Laws of Minnesota, 1907, c. 97 and c. 232; Revised Laws of Minnesota, 1905, sec. 1987. The carriers put in force and since have maintained the reductions ordered in merchandise and passenger fares, but were temporarily enjoined at the institution of these suits from putting in the legislative commodity rates, which

in consequence of the injunction never have become effective.

On the 31st day of May, 1907, nine suits in equity were commenced in the Circuit Court of the United States for the District of Minnesota by stockholders of nine of the principal railway companies doing business in the state. In each suit the defendants were the railway company in which complainant held stock, the members of the Railroad and Warehouse Commission and the Attorney General of the state. In some of the suits shippers by the railways were made defendants. The bills in these suits were fully before the Court in *Ex parte Young, supra.*

These bills were planted on two distinct grounds; (a) that the rates ordered by the Commission and Legislature were unremunerative and confiscatory of complainants' property; (b) that the acts of the Legislature and orders of the Commission operated directly and substantially upon interstate commerce, and for that reason were invalid, whether confiscatory or not.

The nine suits were referred to Hon. Charles E. Otis as Special Master to hear and report the evidence, to find the facts and to recommend the form of decrees. Three of these suits have proceeded to final hearing. The cases were not consolidated, but attention should be called to the fact that, by arrangement between the parties all the evidence in each case is to be considered in all the cases, so far as applicable, material and relevant. (Master's Report, second paragraph.) The Special Master reported an exhaustive finding of facts, covering both grounds for relief set forth in the bills and recommended decrees granting

permanent injunctions as prayed by the stockholders. This report was confirmed by the Circuit Court and permanent injunctions issued, effective July 1, 1911, restraining compliance with by the railway companies and enforcement of by the Railroad Commission, the Attorney General and the other defendants, each and every of the reductions ordered; that is (a) the reduction in class merchandise rates, (b) the reduction in passenger fares and (c) the reduction in commodity rates. The first two of these reductions had been in effect pending the suit, and the other never was effective.

The learned Circuit Judge and the Special Master sustained fully both contentions of the complainants, that is (a) that each of the reduced rates is confiscatory and (b) that each is invalid also because of its direct and substantial operation upon interstate rates and commerce.

Both of these questions arise under the Constitution of the United States and therefore the appellants bring appeals direct to this Court.

The unremunerative character of the rates will be discussed by other counsel.

It is intended in this brief to demonstrate the impossibility of the railway companies obeying the orders of the state of Minnesota here involved and at the same time preserving their commerce among the states, without applying to such commerce the rates prescribed by the state. We shall undertake to prove from the record that the particular laws of Minnesota and orders of the Minnesota Railroad Commission challenged, though on their face confined to traffic moving locally within the state, operate *directly*

and *necessarily* upon the traffic which the carriers move between states; that if the carriers obey the state, they cannot do otherwise than apply the state-made rates to interstate traffic—this because of duties imposed on them by the acts of Congress regulating commerce among the states; that they cannot hold their interstate commerce if they obey the commands of the state and fail to apply to interstate commerce the rates made by the state; and that these results flow, not from competition among carriers, or from their pursuit of their own interests, but from the prohibitions against discrimination in the acts of Congress.

These conclusions are affirmed as facts, which will be found amply proven in the record. Postponing for the present any inquiry as to the law, we desire first to show from the record, that in fact necessarily and directly the state laws and orders complained of do control interstate rates and regulate commerce among the states.

On this branch of the case the facts are hardly in dispute, and the Master's findings are excepted to, only in respect of their legal conclusions. Our references to the record, except where otherwise noted, are to the Transcript in Case 599. The testimony of both complainants and defendants supports the Master's findings on this part of the case and therefore we need not go behind the findings into the testimony. See however the evidence of appellant Staples, a member of the Railroad Commission, and of Flinn, the rate expert of the Commission, Vol. 6 Transcript pp. 2649-50, 2789-90-91, 2794-5, 2880-2, 2894-6, 2897-2900, 2916-17, 2421, 2423-4, 2493-4, 2503, 2505-8.

PRELIMINARY STATEMENT.

Before taking up the Master's findings upon the essential facts of the case reference should be made to the legislation of Minnesota and to the orders of the Railroad Commission involved in the suit and to some other preliminary matters.

By Chapter 28 of the Revised Laws of Minnesota 1905, being legislation originally enacted in 1887, amended in 1901, the general supervision of railroad and express companies doing business as common carriers in the state of Minnesota, and all public warehouses, is vested in a board of three members known as Railroad and Warehouse Commission, with power to adjust and fix rates and prescribe rules and regulations for the conduct of the business of such companies; and fines and penalties are prescribed by the act for failure to comply therewith. The material sections of this law are as follows:

> 1969. Complaint that rate is unreasonable—Duty of commission—Upon the verified complaint of any person or of any corporation, private or municipal, that any tariff of rates, fares, or charges, or any part thereof, or of any classification is unequal or unreasonable, the commission shall proceed to investigate the matters alleged in such complaint, and for the purposes of such investigation they may require the attendance of witnesses and the production of books, papers and documents. If, upon the hearing, such tariff of rates, fares, or charges, or any part thereof, or of such classification, is found to be unequal or unreasonable, the commission shall make an order stating wherein the same are so unequal or unreasonable, and shall make a tariff of rates, fares, charges and classification which shall be substituted for the tariff so complained of. The

tariff so made by the commission shall be deemed prima facie reasonable in all courts and shall be in full force during the pendency of any appeal or other proceedings to review the action of the commission in establishing the same.

1970. Investigation without complaint—The commission shall also of its own motion investigate any matter relating to the management by any such carrier or warehouseman of its business or the reasonableness of any rates, fares, charges, or classifications, whenever, in its judgment, the public interests require it, and in such case the procedure shall be, as nearly as may be, as provided upon the filing of a complaint, and the findings and order in such case shall have the same effect as those made upon complaint.

During the 1905 legislative session of Minnesota, a joint resolution of the House and Senate was passed, approved April 14, 1905 (Session Laws of 1905, c. 350), directing the Railroad and Warehouse Commission "to undertake the work of securing a readjustment of the existing freight rates in this state, which will give a more uniform system of rates throughout the state and a uniform scale of percentages which each class rate shall bear to the first class, the readjustment to secure a substantial reduction in the existing merchandise rates." At the same time funds were provided to enable the Commission to secure a physical valuation of all railroad properties within the state.

Pursuant to this legislative resolution the Railroad Commission made an extended investigation of merchandise rates—that is of rates on the ten classes numbered from 1 to 5 and lettered from A to E, either in carloads or less than carloads—and after hearing the railway companies the Commission made an order

dated September 6, 1906, to become effective November 15, 1906, making extensive reductions in the merchandise rates.

Thereafter on May 3, 1907, the Commission made a supplemental order reducing rates into certain jobbing centers.

The western classification, to which reference is made in these orders, classifies for purposes of transportation substantially all property, dividing it into the ten classes above indicated. The articles within each class take under like conditions the same rate. This classification was in general use through the western states, but in Minnesota several hundred commodities by order of the Minnesota Commission have been removed from the classification and given special rates known as "commodity rates" (See Master's report Transcript Vol. 1, pp. 186-189.)

The schedule of rates set forth in the order of September 6 is such, that for each class for any distance the rate bears such an exact relation to each other rate that, given one rate out of the schedule, any other rate can be ascertained by mathematical computation and without reference to the schedule itself. The plan of the schedule is this:

For first-class merchandise an allowance of 11.02 cents per cwt. is made for terminal charges, and for each five miles or fraction thereof up to 200 miles, .98 of a cent for hauling charges; so that for a distance of five miles the rate is 12 cents per cwt., for ten miles the rate is 12.98 cents per cwt. and for 200 miles the rate is 50.22 cents per cwt. After a distance of 200 miles is reached .98 of a cent per cwt. is allowed

as a hauling charge for each additional ten miles or fraction thereof up to 400 miles; so that the rate for 200 miles being 50.22 cents per cwt. the rate for 210 miles is 51.20 cents, for 220 miles is 52.18 cents, and for 400 miles is 69.82 cents per cwt. After a distance of 400 miles is reached .98 of a cent per cwt. is allowed as a hauling charge for each additional 20 miles or fraction thereof up to 500 miles; so that the rate for 400 miles being 69.82 cents per cwt. the rate for 420 miles is 70.80 cents, and for 500 miles is 74.72 cents per cwt.

The rates for classes other than the first are a fixed per centum of the corresponding rates for the first class, those for the second class being 83 1-3 per cent, for the third class 66 2-3 per cent, for the fourth class 50 per cent, for the fifth class 40 per cent, for class A 45 per cent, for class B 35 per cent, for class C 30 per cent, for class D 25 per cent and for class E 20 per cent. (Transcript Vol. 1, p .189.)

The rates prescribed are maximum terminal rates and may be increased by five per cent for shipments between stations neither of which is a terminal or a distributing station.

The first four classes include both carload and less than carload shipments, but the other classes include only carloads.

The reduction in merchandise rates made by the order of September 6, 1906, was from 20 to 25 per cent, but notwithstanding the extent of the reduction all the railway companies put the rates into effect on the 15th of November, 1906, and they were in effect until the final decree appealed from.

The same is true also with reference to the rates prescribed in the Commission's supplemental order of May 3, 1907, which supplemental order, in the Northern Pacific case, made a reduction of 13.577 per cent in rates upon the traffic covered by it. To what extent it affected rates of the Great Northern does not appear. In the Minneapolis & St. Louis case no relief is asked on account of it. (Transcript Vol. 1, p. 190.)

While the Commission was considering the schedule afterwards incorporated in its order of September 6, 1906, it was considering also a reduction in rates on unclassified commodities. The three northern systems in the state, the Great Northern, the Northern Pacific and the Minneapolis, St. Paul and Sault Ste. Marie companies, voluntarily reduced their rates on grain approximately ten per cent by filing schedules effective September 1, 1906, and their rates on hard and soft coal at least ten per cent by filing schedules effective October 22, 1906. (Transcript Vol. 1, p. 190.)

Notwithstanding these voluntary reductions and the reductions caused by the order of September 6, 1906, the Commission under date December 14, 1906, made an order to become effective January 26, 1907, reducing rates on grain, coal, lumber and livestock. The reduction ordered varied from 10 per cent to 28½ per cent, and was a general average of 17.37 per cent, in addition to the voluntary reductions on grain and coal made by the three northern systems. (Transcript Vol. 1, p. 190.)

In January, 1907, the railroad companies affected by this second order, being all those parties to the nine suits now pending, brought suits and procured from

the Circuit Court of the United States for the District of Minnesota injunctions forbidding enforcement by the Commission of the order. Thereupon the Legislature of the state, which convened early in January, 1907, enacted Chapter 232, General Laws of Minnesota for the year 1907, approved April 18, 1907, by its terms effective June 1, 1907, fixing a new schedule of commodity rates, in which the reduction ordered was 10 per cent less than that directed by the Commission's order of December 14.

By this law the Legislature creates seven new classes numbered 11 to 17. Wheat and thirteen other articles are placed in class 11, corn and thirty-seven other articles in class 12, lumber and five other articles in class 13, sheep in double-decked cars and cattle in class 14, sheep in single-decked cars and hogs in class 15, hard coal in class 16, and soft coal in class 17. There is no fixed percentage relation between classes, and the rule for increasing the rate with increasing distance differs as between classes. In other respects, however, the method of making the schedules is similar to that adopted by the Commission in its order of September 6, 1906. The hauling charge comprehended in the rate for each class decreases with increasing distance and becomes very small for added mileage beyond 200 miles, 400 miles being the longest distance named in the act. On class 11 the difference between the rate for 300 miles and that for 400 miles is 1.1 cents per cwt. amounting to 2.2 mills per ton per mile; on class 12 the difference is 1 cent per cwt. or 2 mills per ton per mile; on class 13 it is 1.2 cents per cwt. or 2.4 mills per ton per mile; on class 14 it is 2.2 cents per cwt. or 4.4 mills per ton per

mile; on class 15 it is 2.5 cents per cwt. or 5 mills per ton per mile; on class 16 it is 24 cents per ton or 2.4 mills per ton per mile; and on class 17 it is 18 cents per ton or 1.8 mills per ton per mile. (Transcript Vol. 1, p. 190-1.)

The schedule applies to shipments in carload lots with minimum weights fixed by the act.

Meantime at the same session the Legislature had passed the two cent passenger law, an act approved April 4, 1907, by its terms effective May 1, 1907, prescribing as maximum rates for the transportation of passengers within the state two cents per mile for passengers of twelve years of age or over, and one cent per mile for passengers under twelve years of age. The maximum theretofore had been 3 cents for adult passengers and 1½ cents for those under twelve years of age.

The defendant railway companies on May 1. 1907, published and put into effect the passenger rates prescribed by the act, and were about to put into effect the commodity rates prescribed by the act of April 18, 1907, and would have done so had they not been restrained by the writs of injunction issued in these suits. Apparently in what they did and were about to do, both with respect to the Commission's orders and the acts of the Legislature, they were influenced by the severe penalties of the statutes. (Transcript Vol. 1, p. 191.)

If the railway companies had refused to obey the orders of the Commission and the acts of the Legislature aforesaid, or had ceased to obey the same or either thereof, the Attorney General and the Commission were intending to take, and would have instituted,

proceedings by mandamus or otherwise, against them and each of them and their respective officers and agents, to enforce obedience to the acts and orders, and such proceedings would have been taken but for the injunctional orders issued herein. (Transcript Vol. 1, p. 192.)

Before the suits were brought the complainants in each demanded of the president and directors of the railroad company, of which they were stockholders, that they, said president and directors, cease obedience to and that they refuse to obey the orders and acts stated, and each of them, and that forthwith they institute proper legal proceedings to test the legality thereof. The railroad companies and their officers and agents refused compliance with these demands, because of the extreme fines and penalties imposed by the statutes. (Transcript Vol. 1, p. 192.)

It has been established by proofs that complainants were qualified to bring these suits and that the Circuit Court had jurisdiction of the parties and of the subject matter thereof, and that the suits are not in any manner or to any extent collusive to confer on a court of the United States jurisdiction of a case of which it otherwise would not have jurisdiction. (Transcript Vol. 1, p. 192.)

The ten merchandise classes cover all shipments of general merchandise in both carloads and less than carloads, also shipments in less than carloads of grain, lumber, coal, livestock and the other commodities, which fall under the so-called commodity rates only when shipped in carloads. It thus appears that within seven months material reductions were ordered covering substantially all traffic in Minnesota both pas-

senger and freight; and this notwithtanding considerable voluntary reductions in grain and coal rates, made by the carriers themselves.

Summarized, the reductions in rates challenged by these suits are as follows:

1. Reduction in maximum rates on general merchandise amounting to from 20 per cent to 25 per cent. (Commissioner's order of September 6, 1906.)

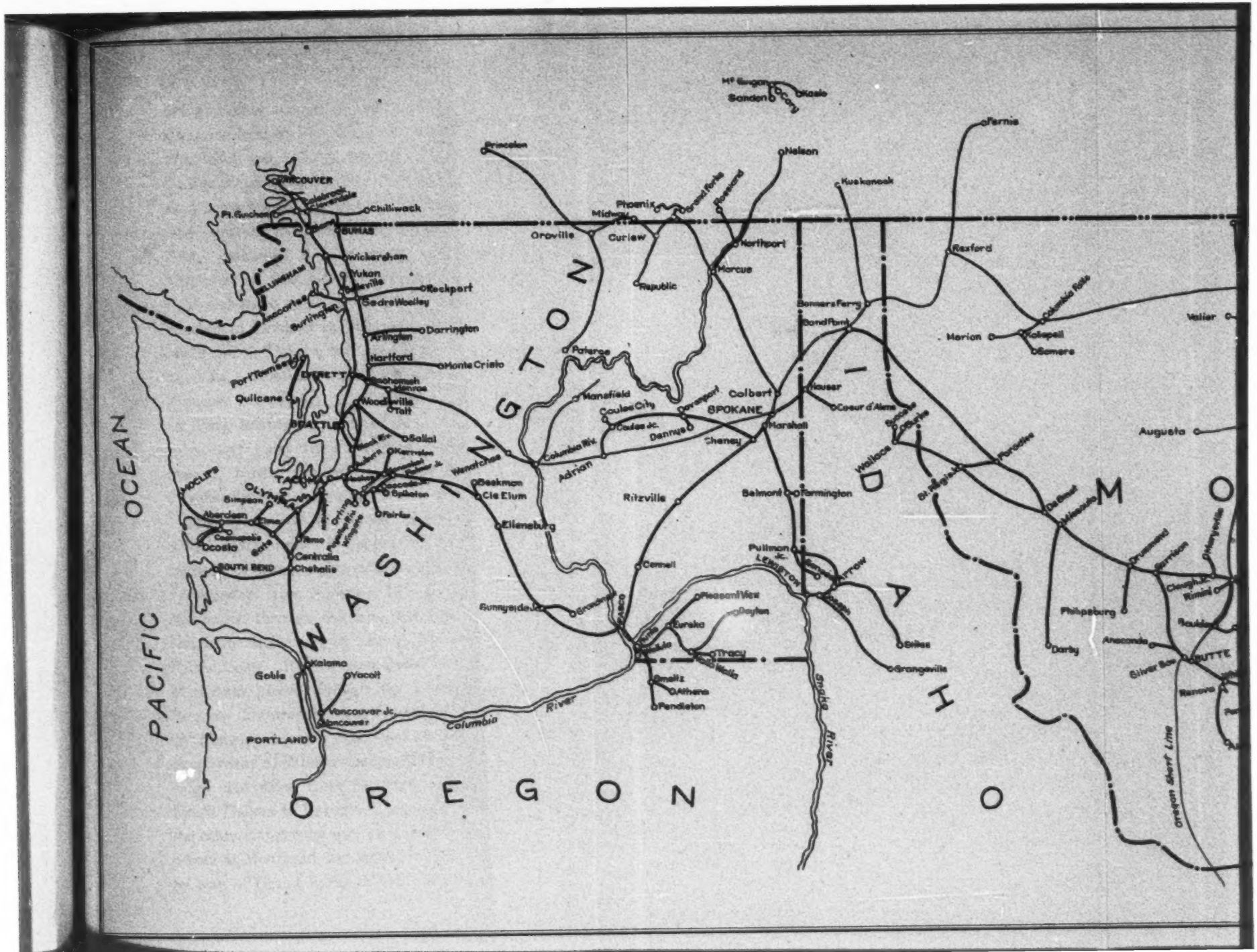
2. Reduction in maximum rates for passengers amounting to 33 1-3 per cent. (Session Laws of 1907, c. 97.)

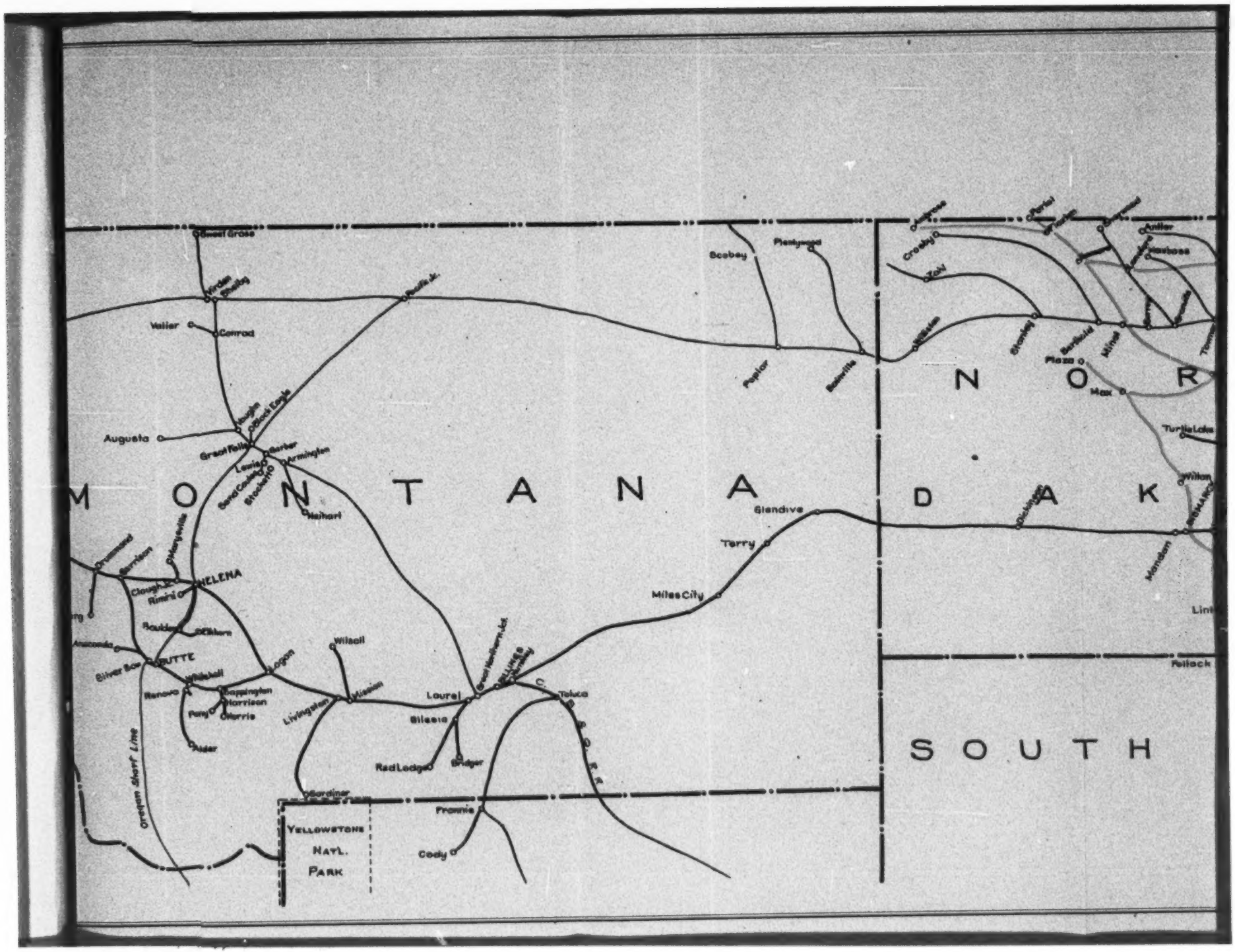
3. Reduction in maximum rates on grain, lumber, livestock and coal amounting to 7.377 per cent. (Session Laws of 1907, c. 232.)

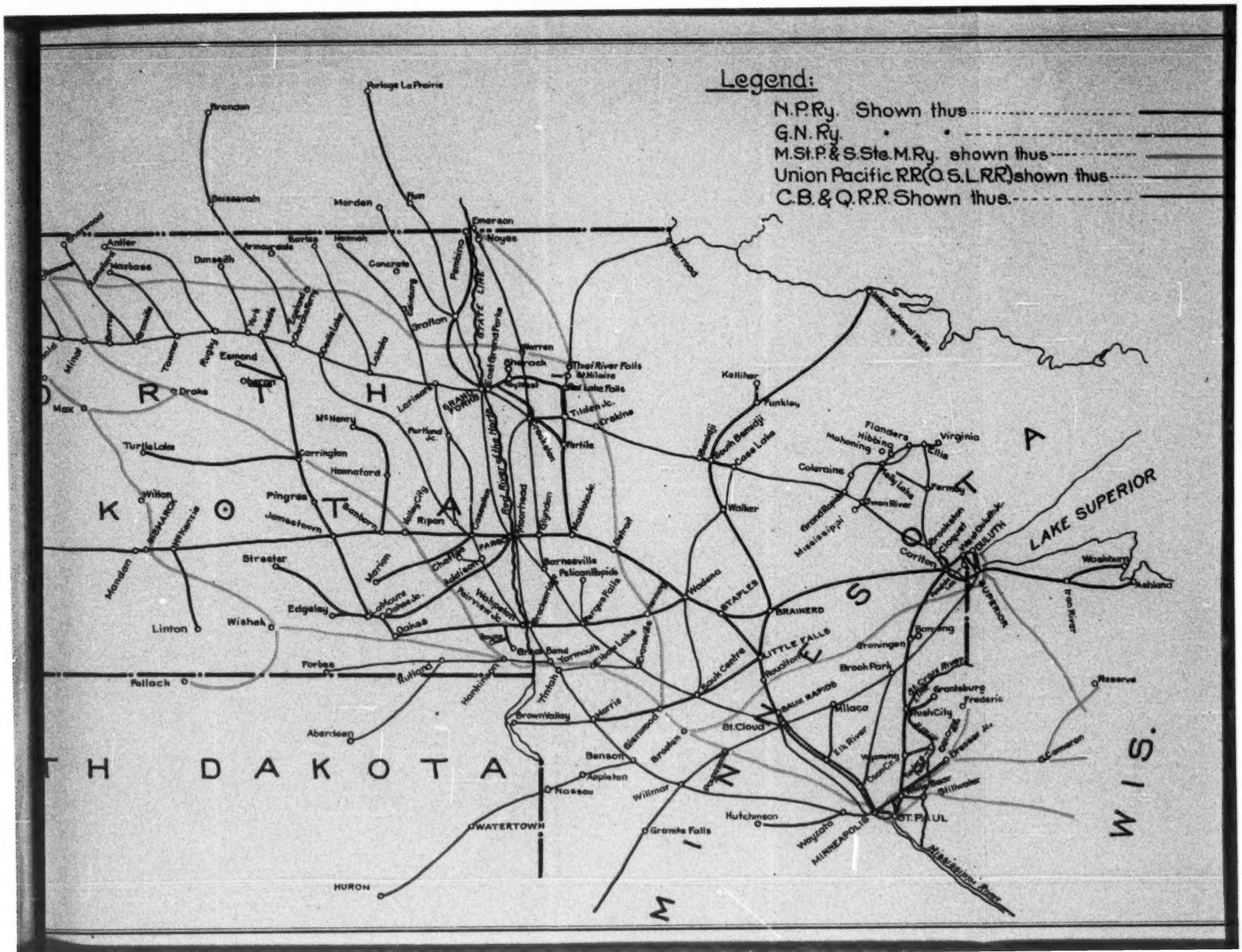
4. Reduction in rates on merchandise to certain distributing stations amounting, in the Northern Pacific case, to 13.58 per cent. (Commission's order of May 3, 1907.)

The map opposite this page shows the systems of the Northern Pacific and Great Northern companies, and that of the Minneapolis & St. Louis can be indicated sufficiently without a map.

The Northern Pacific lines extend from Ashland and Superior in Wisconsin on Lake Superior and from Duluth in Minnesota on the same lake westwardly through Minnesota, North Dakota, Montana, Idaho and Washington and to Portland in the state of Oregon and are shown in black on the map. This system approximately consists of 7,695.80 miles of railway of which 1,625.20 miles are in Minnesota. Between Du-


PACIFIC OCEAN
WASHINGTON
IDAHO
OREGON
MONTANA
VANCOUVER
Chilliwack
Ft. Fraser
BURNABY
Princeton
Nelson
Fernie
Kuskanook
Phoenix
Greenwood
Rossland
Midway
Oroville
Curlew
Northport
Republic
Marcus
Rexford
Bonners Ferry
Bonnerferry
Columbia Falls
Kalispell
Somers
Marion
Whitefish
Augusta
Sandon
Kaslo
Cody
Mt. Sturgeon
Wickersham
Yukon
Sedro Woolley
Burlington
Arlington
Darrington
Hartford
Monte Cristo
Port Townsend
EVERETT
Snohomish
Monroe
Quilcene
Woodinville
Tolt
SEATTLE
Sallal
Kennydale
Renton
Tacoma
Auburn
Sumner
Orting
Puyallup
Sumner Jct.
Sylvester
Fairfax
Hoquiam
Aberdeen
Simpson
Cosmopolis
Ocosta
Centralia
Chehalis
SOUTH BEND
Goble
Kalama
Yacolt
Vancouver Jct.
Vancouver
PORTLAND
Columbia River
Wenatchee
Adrian
Beckman
Cle Elum
Ellensburg
Ritzville
Mansfield
Coulee City
Coulee Jct.
Davenport
Colbert
SPOKANE
Dennys
Cheney
Marshall
Hauser
Coeur d'Alene
Wallace
Belmont
Farmington
Pullman Jct.
LEWISTON
Cornell
Sunnyside Jct.
Grandview
Reservoir View
Dayton
Eureka
Tracy
Smiths
Omaha
Athena
Pendleton
Spokane River
Bliss
Grangeville
Orofino
St. Maries
Harrison
Dr. Bruce
Missoula
Philipsburg
Darby
Anaconda
Silver Bow
BUTTE
Ramsay
Drummond
Garrison
Clearwater Jct.
Rimini
Oregon Short Line


Sweet Grass
Scobey
Plentywood
Chester
Havre
Rudyard
Joplin
Chinook
Malta
Glasgow
Wolf Point
Culbertson
Crosby
Noonan
Fortuna
Columbus
Antler
Portal
Bowbells
Kenmare
Velier
Conrad
Augusta
Great Falls
Shelby
Cut Bank
Browning
Kalispell
Whitefish
Libby
Eureka
Troy
Bonner
Lewis
Sand Coulee
Stockett
Armington
Neihart
Dupuyer
Valier
Williston
Stanley
Parshall
Minot
Towner
Plaza
Max
Turtle Lake
Wilton
Harvey
Hamberg
Glendive
Terry
Miles City
Hamden
Dickinson
Lint
Pollock
Dressed
Harlowton
Marysville
HELENA
Clancy
Rimini
Boulder
Whitehall
Ramsay
Pony
Sappington
Harrison
Norris
Ennis
Three Forks
Manhattan
Bozeman
Livingston
Wilsall
Logan
Mission
Laurel
Great Northern Jct.
Billings
Huntley
Toluca
Silesia
Red Lodge
Bridger
Gardiner
Yellowstone
Natl.
Park
Cody
Fromme
Absarokee
Columbus
Silver Bow
Anaconda
BUTTE
Dillon
Ohio
Wisconsin
Minnesota
Dakota
Montana
Pacific
Great Northern
Northern Pacific
Chicago, Milwaukee, St. Paul & Pacific
Oregon Short Line
NORTH DAKOTA
SOUTH


Legend:
N.P.Ry. Shown thus
G.N.Ry. • •
M.St.P.&S.Ste.M.Ry. shown thus
Union Pacific R.R.(O.S.L.R.R.)shown thus
C.B.&Q.R.R. Shown thus.
Portage La Prairie
Brandon
Russell
Minnedosa
Neepawa
Gladstone
Amaranth
Carberry
Austin
Portage
Treherne
Glenboro
Cypress River
Holland
Souris
Melita
Arcola
Oxbow
Estevan
Bienfait
Roche Percee
Weyburn
Carlyle
Torquay
Alameda
Gainsborough
Manor
Antler
Harlock
Dunseith
Armagosa
Burlap
Hannah
Conrath
Plaza
Palermo
Emerson
Noyes
Minot
Surrey
Granville
Towner
Rugby
Esmond
Fort Totten
Leeds
Sanford
Churchs Ferry
Devils Lake
Lakota
Oberon
Edmore
Grafton
Park River
Grand Forks
Larimore
Mayville
Portland
Northwood
Hillsboro
Reynolds
Thief River Falls
St.Hilaire
Red Lake Falls
Warren
Argyle
Crookston
Fertile
Tilden Jc.
Erskine
Mahnomen
Detroit
Lake Park
Audubon
Frazee
Perham
Motley
Staples
Wadena
Brainerd
Little Falls
Foley
Milaca
Elk River
Anoka
Minneapolis
St.Paul
Hutchinson
Watertown
Huron
Aberdeen
Redfield
Miller
Highmore
Onida
Gettysburg
Pierre
Mobridge
Eureka
Bowdle
Hettinger
Lemmon
Reeder
Scranton
Dickinson
Mandan
Bismarck
Wilton
Hazelton
Steele
Jamestown
Pingree
Carrington
Harvey
Ripen
Turtle Lake
Mt Henry
Hannaford
Drake
Max
Velva
Minot
Kenmare
Bowbells
Crosby
Stanley
Ray
Tioga
Williston
Watford City
Killdeer
Dunn Center
Halliday
Beach
Sentinel Butte
Medora
Belfield
Fairfield
Glendive
Wibaux
Mott
Hettinger
Reeder
Scranton
Bowman
Marmarth
Baker
Ismay
Terry
Fallon
Ekalaka
Broadus
Alzada
Camp Crook
Buffalo
Lemmon
Hettinger
Mott
Reeder
Bowman
Scranton
Marmarth
Baker
Ismay
Terry
Fallon
Ekalaka
Broadus
Alzada
Camp Crook
Buffalo
Kelliher
Funkley
Bemidji
South Bemidji
Cass Lake
Walker
Flanders
Hibbing
Mahoning
Virginia
Ellie
Coleraine
Kelly Lake
Grand Rapids
Mississippi
Brown River
Farming
Brookston
Cloquet
Carlton
Duluth
Superior
Lake Superior
Washburn
Ashland
Iron River
Reserve
Cameron
Grantsburg
Frederic
Rush City
Braham
Hinckley
Mora
Cambridge
Isanti
Princeton
Elk River
Milaca
Foley
Little Falls
Brainerd
Staples
Wadena
Motley
Perham
Frazee
Detroit
Lake Park
Audubon
Fergus Falls
Pelican Rapids
Barnesville
Hawley
Glyndon
Moorhead
Red River of the North
Casselton
Kindred
Mapleton
Horace
West Fargo
Fargo
Harwood
Reynolds
Hillsboro
Northwood
Larimore
Mayville
Portland
Grafton
Park River
Grand Forks
Oakes
Edgeley
Streeter
Linton
Wishek
Ellendale
Forbes
Fallach
Rutland
Hankinson
Wahpeton
Breckenridge
Fairmount
Lidgerwood
Wyndmere
Lisbon
Enderlin
Valley City
Cooperstown
Jamestown
Ripon
Carrington
Harvey
Hannaford
Turtle Lake
Mt Henry
Drake
Max
Velva
Minot
Kenmare
Bowbells
Crosby
Stanley
Ray
Tioga
Williston
Watford City
Killdeer
Dunn Center
Halliday
Beach
Sentinel Butte
Medora
Belfield
Fairfield
Glendive
Wibaux
Mott
Hettinger
Reeder
Scranton
Bowman
Marmarth
Baker
Ismay
Terry
Fallon
Ekalaka
Broadus
Alzada
Camp Crook
Buffalo
Lemmon
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luth and other Minnesota points the company has two lines, one local in Minnesota and one passing through Wisconsin and joining the line within the state at Carlton 20 miles westwardly from Duluth. The company has a branch line leaving the main line at Manitoba Junction, 225 miles northwestwardly from St. Paul, extending in a northerly direction leaving Minnesota at East Grand Forks, 320 miles from St. Paul and there entering the state of North Dakota, running to Pembina in that state, on the border between North Dakota and Manitoba, 414 miles from St. Paul. Another branch leaves the main line at Wadena, Minnesota, 160 miles westwardly from St. Paul, leaving the state of Minnesota at Breckenridge, 237 miles from St. Paul, running thence to Oakes, North Dakota, 311 miles from St. Paul. (Transcript Vol. 1, p. 199.)

The system of the Great Northern is indicated in red on the map. It consists of 8,528.98 miles of railroad of which 2,779.30 are in Minnesota. This line extends from Superior, Wisconsin, and Duluth, Minnesota, through the same states traversed by the Northern Pacific and to Seattle and Portland on the Pacific Coast. Its line from Duluth to other points in Minnesota passes through the state of Wisconsin. Between Minneapolis and Larimore, North Dakota, the company has two main lines of railway; one running by way of Willmar leaving Minnesota at Breckenridge, 214 miles from St. Paul, running thence in North Dakota to Larimore, 345 miles from St. Paul; the other running by way of Barnesville leaving Minnesota at Moorhead, 241 miles from St. Paul, running by way of Grand Forks to Larimore, 348 miles from

St. Paul. The main line between Duluth and Larimore running through Crookston leaves the state of Minnesota at East Grand Forks, 296 miles from Duluth, extending thence to Larimore, 325 miles from Duluth. This company has a branch wholly within Minnesota leaving the main line at Barnesville and extending northerly to Noyes, on the Canadian border, 391 miles from St. Paul. It has another branch leaving the main line at Willmar and running in a southwesterly direction leaving Minnesota at Jasper, 218 miles from St. Paul, and running in South Dakota by way of Sioux Falls to Yankton, 311 miles from St. Paul, and to Sioux City, Iowa, 327 miles from St. Paul. Another branch leaves the main line at Benson extending in a southwesterly direction running out of Minnesota at Nassau, 173 miles from St. Paul, and thence to Huron, South Dakota, 294 miles from St. Paul. (Transcript Vol. 1, p. 199.)

The Minneapolis & St. Louis system consists of 632.06 miles of railway owned and 396.43 miles of railway operated under lease or trackage rights. Its lines extend from St. Paul and Minneapolis westwardly, southwestwardly and southerly, one running to LeBeau, South Dakota, one running to Storm Lake, Iowa, and one by way of Albert Lea, Minnesota, to Des Moines, Iowa. (Transcript Vol. 1, p. 200.)

THE ESSENTIAL FACTS IN THE RECORD.

We come now to the facts bearing directly on the essential issues, and these will be stated from the Master's report.

The whole of the railroad properties of each of said companies constitutes a single system operated as such.

The cars, engines and supplies of each company customarily are used upon its system wherever required, and without regard to whether the business in which they are employed is interstate or local to a state. It always has been and is impracticable and apparently it is impossible for either company to operate its property within any state so as to carry either passengers or freight local to that state separately from its interstate passengers or freight. Each of the carriers customarily has carried and does carry on the same train and in the same car interstate passengers and passengers local to a state, and customarily has carried and does carry on the same train and, if less-than-carload freight in the same car, interstate freight and freight local to a state; and it cannot do otherwise practicably or in the exercise of any fair economy. (Finding 4. Transcript Vol. 1, p. 200.)

By far the larger part of the business of each carrier is interstate; and by far the larger part of the business of each within Minnesota is interstate. For example, in the year 1906, taken as a sample year in the testimony, the freight business of the Northern Pacific local to the state of Minnesota was but 2.67 per cent of the company's entire freight business and but 12.33 per cent of the company's freight business touching the state; and its passenger business local to the state of Minnesota was but 5.79 per cent of its entire passenger business and but 67.21 per cent of its passenger business touching the state. (Finding 5. Transcript Vol. 1, p. 201.)

For many years the conditions attending the transportation of passengers, of merchandise covered by the order of September 6, 1906, and of commodities

covered by Chap. 232, Gen. Laws 1907, have been and still are substantially the same for like distances within those portions of the states of Wisconsin, Minnesota, North Dakota and South Dakota reached by these carriers, regardless of whether such transportation is local to a state, or interstate.

Prior to the taking effect of the order of September 6, 1906, and the two cent maximum passenger fare law, each carrier had maintained an equable, that is a *relatively* fair, basis of rates for merchandise and passengers the transportation of which touched Minnesota, regardless of whether the transportation was state or interstate, and each of them still maintains such equable basis of rates for the transportation of commodities covered by Chap. 232, Gen. Laws 1907, regardless of whether the carriage is local within Minnesota or interstate.

Any substantial change in the basis of rates or in any particular rate, due only to the fact that the transportation is interstate or local within any state, would constitute actual, undue and unjust discrimination in fact as between the interstate and local rates; and any substantial difference in rates for the transportation of passengers, merchandise or commodities, as between traffic local to the state of Minnesota and traffic which goes between the state of Minnesota and either of its neighboring states, would constitute actual, undue and unjust discrimination in fact. (Finding 6. Transcript Vol. 1, p. 201.)

Superior, Wisconsin, and Duluth, Minnesota, are situated side by side at the western extremity of Lake Superior. Each is an important business center. Conditions attending transportation to and from each

are the same. The railroad companies reaching them always have accorded them like rates. They ship and receive the same kinds of freight to and from the same localities. Any substantial difference in rates would destroy the commerce of the city charged the higher rates. The propriety of a parity of rates to and from these cities always has been recognized.

For the same reasons, each pair of towns composed of Grand Forks, North Dakota, and East Grand Forks, Minnesota, Fargo, North Dakota, and Moorhead, Minnesota, and Wahpeton, North Dakota, and Breckenridge, Minnesota, always has been accorded like rates in and out. The towns in each pair depend upon the same carriers, have substantially the same producing and consuming markets and receive and ship the same kinds of articles. Any substantial difference in rates between them would damage seriously, if not destroy wholly, the commerce of the city charged the higher rates, and would be an undue and unjust disadvantage to it and an undue and unjust preference and advantage to its competing city.

Failure by the Northern Pacific or Great Northern to concede in and out of Superior substantially as low rates as are charged Duluth would impair seriously the power of the carrier to transact interstate business in or out of Superior and would depreciate seriously the value of its property in that city. (Finding 7. Transcript Vol. 1, p. 201.)

The order of September 6, 1906, prescribed for transportation within the state of Minnesota maximum rates which were from 20 per cent to 25 per cent lower than those theretofore established by the Northern Pacific and Great Northern companies, and up to the

taking effect of the order maintained by them for transportation in Wisconsin, Minnesota and North Dakota, regardless of whether such transportation was local to either state or interstate between any two of them. If, after the installation of the rates prescribed by the order for transportation within Minnesota, these companies had continued to maintain the former rates for transportation between Minnesota and adjoining states, the result would have been serious discrimination against localities in the neighboring states.

For example, prior to the taking effect of the order the rate maintained by the Northern Pacific on a 200-pound barrel of flour (fourth class) from Minneapolis to Fargo was 68 cents. The schedule annexed to that order fixed 54.2 cents as a maximum from Minneapolis to Moorhead. This is a fair example of the difference between the interstate rates for transportation between points in Minnesota and in an adjoining state and the rates prescribed by the order for transportation wholly within the state. (Ex. 41 Baird, Transcript Vol. 10 and Vol. 3, p. 1460.)

On the day that in obedience to the order the Northern Pacific installed its rates in Minnesota, it reduced (1) its interstate rates between Superior and points in Minnesota to an exact parity with its rates between Duluth and other points in Minnesota, (2) its interstate rates between Grand Forks, Fargo and Wahpeton, North Dakota, and Minnesota points to an exact parity with its rates to the same points from East Grand Forks, Moorhead and Breckenridge, and (3) its interstate rates between Superior and Grand Forks, Fargo and Wahpeton, respectively, to an exact

parity with its state rates between Duluth and East Grand Forks, Moorhead and Breckenridge, respectively. The reduction was substantial. For example, the reduction in the rate on first class from Superior to Fargo was from 67 cents per cwt. to 55.1 cents per cwt.; and on fifth class from 27 cents to 22 cents per cwt. (Ex. 41 Baird.)

These reductions were compelled by the necessary and direct operation of the order. Had they not been made, Superior could not have competed in business in Minnesota with Duluth; Fargo, Grand Forks and Wahpeton could not have competed with Moorhead, East Grand Forks and Breckenridge, respectively, nor could Superior have competed successfully with Fargo, Grand Forks or Wahpeton. Moreover, although the Northern Pacific suffered a substantial loss in revenue from its interstate business, it had the choice of submitting to that loss, or of suffering substantial destruction of its interstate commerce between these localities in articles covered by the order.

On the day that the Northern Pacific made these reductions in its interstate rates the Great Northern made similar reductions, although its business between Duluth and Minnesota points is interstate. The reason for its reductions from Duluth was to preserve the relation in rates from Duluth, which always had existed, between stations on the Great Northern and stations on the Northern Pacific, and also to meet the reduced rates on the Northern Pacific. (Finding 8. Transcript Vol. 1, p. 202, and complainant's exhibit 44. Vol. 6, Transcript in No. 600.)

Moorhead, Minnesota, Fargo and Bismarck, North Dakota, Billings and Butte, Montana, are so-called "jobbing centers." Prior to the taking effect of the order of September 6, 1906, they always had been accorded by the Northern Pacific rates, which would allow them to compete in distribution of merchandise with their nearest neighbors and with St. Paul and Minneapolis and Duluth. The sum of carload rates from St. Paul, Minneapolis and Duluth to these centers and the less-than-carload rates out from these centers to the territory geographically tributary to them respectively had been such, as to compare favorably with rates in and out of their local competitors, as well as with the less-than-carload rates from St. Paul, Minneapolis and Duluth into the territory geographically served by them respectively. The order of September 6, 1906, as supplemented by the order of May 3, 1907, substantially reduced carload rates from Duluth, St. Paul and Minneapolis to Moorhead. This reduction would have given Moorhead a substantial advantage in territory accessible to its jobbing industry, as against Fargo unless carload rates to Fargo were similarly reduced, and also as against Duluth, St. Paul and Minneapolis unless less-than-carload rates from these points to points geographically accessible to Moorhead, which included a considerable territory in North Dakota, were similarly reduced. This reduction, unless accompanied by a corresponding reduction in carload rates to Fargo from the eastern terminals, would have served to build up Moorhead at the expense of Fargo and therefore, as a matter of fact, to discriminate unduly and unjustly against Fargo; and would have destroyed the relation in rates which there-

tofore had existed between the sum of carload rates into Moorhead and the less-than-carload distributing rates out on the one hand, and less-than-carload distributing rates from Duluth, St. Paul and Minneapolis to localities accessible to Moorhead on the other. If Fargo were protected as against Moorhead by a like reduction in carload rates, it would have an advantage and preference over Bismarck in territory common to them both, and also an advantage over the eastern terminals in territory common to Fargo and them, unless carload rates from the eastern terminals to Bismarck and less-than-carload rates from the eastern terminals to the territory accessible to Fargo should be correspondingly reduced. This advantage would constitute an undue and unjust preference to Fargo as against Bismarck, which competes in certain territory with Fargo, unless rates on carload lots from the eastern terminals to Bismarck should be correspondingly reduced. And so on, from distributing point to distributing point. (Finding 9. Transcript Vol. 1. p. 203.)

Every rate comprehends two terminal charges, the initial and the final, and a distance haulage charge. It is a cardinal principle of rate-making that a rate for a longer distance should be proportionately less than one for a shorter distance; that is to say, that a rate for 500 miles should be less than twice the rate for 250 miles, if conditions of transportation be the same; because the rate for 250 miles includes two terminal charges, and if the rate for 500 miles were twice the rate for 250 miles, it would include manifestly the equivalent of four terminal charges. Even if the haulage charge per mile were the same for a

haul of 500 miles as for a haul of 250 miles, which is contrary to the rule generally applied in rate-making, the rate per ton per mile for the 500 miles should be less than for the 250 miles, because in one case the terminal charges would be spread over 500 miles and in the other over only 250 miles.

Comparison of rates now maintained by the Northern Pacific from St. Paul to various stations in North Dakota and Montana, with those established by the order of September 6, 1906, and now maintained by the company between St. Paul and Moorhead, discloses that in general the commission-made rates from St. Paul to Moorhead are substantially less than the proportion of the presently maintained interstate rates to these various points in North Dakota and Montana, based on the mileage in Minnesota as compared to that of the entire haul. For example, the rate now maintained by the Northern Pacific on class E merchandise from St. Paul to Miles City, 743 miles from St. Paul, is 39 cents per cwt.; the rate to Moorhead, based on the proportion of 39 cents, which the mileage of the haul in Minnesota is of the entire haul, is 13 cents. The order allows only 11 cents per cwt. from St. Paul to Moorhead, in which of course are included two full terminal charges. Maintaining rates, comparison between which shows this result, involves substantial, undue and unjust discrimination in fact against the interstate localities. (Ex. 46. Baird, Transcript Vol. 10.) (Finding 10. Transcript Vol. 1, p. 204.)

After the installation by the Great Northern and the Northern Pacific companies of the rates prescribed by the order of September 6, 1906, it appeared that the sum of the locals from St. Paul to Moorhead and from

Moorhead to many points in North Dakota was less than the interstate rates then maintained from St. Paul to these points in North Dakota. Thereupon both companies established and now maintain rates from St. Paul to these North Dakota points, which as a rule are no greater than the sum of the locals on Moorhead, but which are substantially lower in general than the interstate rates maintained by them before the order was made. Maintaining from St. Paul to North Dakota localities interstate rates substantially greater than the sum of the locals based on the state line would have involved undue and unjust discrimination in fact.

On the trial solicitors for defendants suggested that these reductions were made by the companies upon complaint of merchants of St. Paul, Minneapolis and Duluth; but on this point the uncontradicted testimony of the chief witness for the complainants was, that the reduction was made in order to protect the power of the railroads to do interstate business,—to remove the ability of shippers to ship to Moorhead and to trans-ship to the point of destination. As a matter of fact, the reasons for such reduction were to prevent trans-shipment at Moorhead in order to take advantage of the lower sum of the locals; to retain on the carrier's own line traffic which was liable to reach Moorhead over other lines by reason of competition; and as to less-than-carload lots to enable jobbers in the Twin Cities and Duluth to compete with Moorhead and Fargo in territory which otherwise the latter would have occupied exclusively by reason of their closer proximity, an advantage to which it cannot be said such jobbers were entitled, although theretofore

they had been able to participate in such business. (Finding 11. Transcript Vol. 1, p. 205.)

It is one of the fundamental dogmas of rate making that conditions remaining the same the haulage charge per mile shall not increase with increasing distance. The order of September 6, 1906, promulgates a schedule which for first class merchandise, for example, allows a terminal charge of 11.02 cents per cwt. and a haulage charge of .98 cent per five miles up to 200 miles, then a haulage charge of .98 cent per ten miles for added distance up to 400 miles, and then a haulage charge of .98 cent per twenty miles up to 500 miles—the limit of distance covered by the order. Both the terminal charge and the haulage charge allowed for the other merchandise classes are a fixed percentage of the charges allowed for first. Under this schedule a hundred pounds of merchandise transported by the Northern Pacific from St. Paul to Moorhead, 248 miles, has been hauled for 48 miles, at the rate of .98 cent per ten miles when Moorhead is reached. If this same haulage charge of .98 cent per ten miles be applied for the remaining distance of the haul from St. Paul to Spokane, Washington, 1,510 miles from St. Paul (which is taken as a fair example merely for the illustration of this principle), it would produce a rate from St. Paul to Spokane on first class merchandise of $1.79 per cwt. In the Spokane Rate Case the Interstate Commerce Commission has fixed the reasonable rate on first class merchandise from St. Paul to Spokane of $2.50. Maintaining this rate from St. Paul to Spokane and at the same time the Commission's schedule in Minnesota necessarily involves the raising of the per mile haulage charge after the Minnesota state line has

been crossed, or the charging within Minnesota a higher rate for its mileage proportion of long haul interstate business than for business local to the state carried over the same rails and under the same conditions; and necessarily involves undue and unjust discrimination in fact against localities westerly of the Minnesota-North Dakota boundary line. Defendants' solicitors, however, insist that in extending the state-made rate beyond the boundary line, if an equable basis is sought, the ton-mile charge for such extension must be found by dividing the total charge to such boundary by the distance thereto from the point of origin, which would increase considerably the extension rate beyond the state line over the rate if extended by the method suggested by complainants. This method suggested by defendants, however, is not the principle on which the state schedule of rates is constructed, and even so it does not give traffic carried on the extended interstate rate the benefit of the spread over the longer haul of the two terminal expenses. (Finding 12. Transcript Vol. 1, p. 205.)

For more than twenty-five years the Northern Pacific has maintained an equal basis of rates on merchandise between its eastern terminals and Butte and between its western terminals and Butte and between its eastern terminals and localities intermediate them and Butte and between its western terminals and localities intermediate them and Butte. During the same time other railroads reaching Butte have maintained like rates to Butte from Sioux City, Omaha, St. Joseph and Kansas City on the east, and from San Francisco, Sacramento and Los Angeles on the west. Butte has been as the hub of a wheel with spokes representing equal

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rates to these various cities. Industries have been born and have grown in reliance upon this parity of rates. To intermediate points rates have been fixed in proportion with the Butte rates. Competition of markets and of carriers has brought this about. The Northern Pacific cannot maintain its present commission-made rates between its eastern terminals and Moorhead coincidentally with its present interstate rates from its eastern terminals to Butte, without substantial discrimination in fact against Butte and localities intermediate its eastern terminals and Butte. If its rates from its eastern terminals to Butte and intermediate stations be lowered to such an extent as to obviate substantial discrimination in fact, the company must, to preserve the relation which always has existed, lower to a like extent its rates from its western terminals to Butte and intermediate stations. If, then, the Northern Pacific maintain the commission-made rates between its eastern terminals and Moorhead it must, either substantially discriminate in fact, or destroy the general relation of rates which for many years has existed in the territory between the Missouri river and the Pacific coast. (Finding 13. Transcript Vol. 1, p. 206.)

Prior to the taking effect of the order of September 6, 1906, the Great Northern and the Northern Pacific companies, in connection with other carriers, had established joint through rates from all localities easterly or southerly of the state of Minnesota to all points in Minnesota westerly of St. Paul and Minneapolis reached by them respectively, and these rates were in force at the time of the taking effect of the order. After the rates prescribed by the order were installed,

the sum of the locals on St. Paul from all localities southerly and easterly of Minnesota to all localities in Minnesota westerly of St. Paul and Minneapolis reached by these companies was substantially less than the then existing interstate rates between such localities southerly or easterly of Minnesota and such Minnesota localities. Maintaining such a relation of rates would have involved in fact undue and unjust discrimination against the localities easterly and southerly of Minnesota and an unjust and undue preference and advantage for St. Paul; because merchandise could have been shipped to St. Paul from all localities easterly and southerly of Minnesota on the theretofore established and then existing interstate rates and could have been distributed from St. Paul to all points westerly of St. Paul and Minneapolis on the rates prescribed by the order, for charges in the aggregate substantially less than would have been incurred for the through haul under the through interstate rates then existing. In order to avoid such discrimination, forthwith after the taking effect of the order, the companies withdrew the then existing interstate rates and established a new tariff of through rates which were no higher than the sum of the locals on St. Paul. For example, the former through rate from Chicago to Wadena, Minn., on first class merchandise was $1.09 per cwt. The sum of the locals on St. Paul after the taking effect of the order was $1.004. The present through rate is $1.004, being a reduction of 8.6 cents per cwt. (Ex. 44 Maguire, Transcript in No. 600, Vol. 6.) (Finding 14. Transcript Vol. 1, p. 207.)

The proof is clear that conditions attending transportation are substantially the same in Minnesota and

North Dakota, whether the transportation is local to either state or is interstate. If unjust and undue preference and advantage in rates is to be avoided, like rates must exist for like distances under like circumstances. The Northern Pacific and Great Northern companies, prior to the taking effect of the order, maintained an equitable basis of rates in the territory which these two states compose without regard to state lines. For example, the interstate rates from Moorhead, Minnesota, westerly into North Dakota have been the same as from Moorhead easterly into Minnesota and no conditions have existed or do exist which justify a basis of rates for eastbound different to that for westbound transportation.

Prior to the installation of the rates prescribed by the order the rate per cwt. of first class merchandise for 100 miles, for example, out of Moorhead, whether westerly into North Dakota or easterly into Minnesota, was 43 cents. For transportation westwardly into North Dakota this rate from Moorhead still exists. The rate prescribed by the order and now in effect from Moorhead eastwardly into Minnesota is per cwt. of first class merchandise 30.6 cents. This disparity of rates for transportation under substantially similar conditions, a disparity which increases with increase in distance easterly from Moorhead, constitutes an undue preference and advantage to the eastwardly localities in Minnesota and a corresponding prejudice and disadvantage to the westwardly localities in North Dakota. If the companies maintaining this unfair relation of rates are to continue to maintain the rates prescribed by the order, they can remove the existing undue and unjust discrimination against the interstate

localities in North Dakota, only by reducing the interstate rates from Moorhead to localities in North Dakota to a substantial parity with those maintained from Moorhead to localities at like distance in Minnesota. (Ex. 35 Baird, Vol. 10, Transcript.) (Finding 15. Transcript Vol. 1, p. 207.)

The Great Northern owns and operates a branch line to Noyes, 391 miles from St. Paul. The line between St. Paul and Noyes is wholly within the state of Minnesota. Conditions attending transportation of merchandise from St. Paul to Noyes are at least no more favorable than those attending transportation from St. Paul to localities in North Dakota on the main line of the company and equally distant from St. Paul. All that is claimed by complainants is that conditions are substantially alike. Prior to the taking effect of the order the rate per cwt. of first class merchandise for transportation on the Great Northern from St. Paul to a locality 390 miles distant and situate either in Minnesota or in North Dakota was 96 cents. The commission-made rate from St. Paul to Noyes is 68.8 cents. Such a disparity in rates without substantial dissimilarity in conditions constitutes undue and unjust discrimination in fact. (Ex. 46 Maguire, Vol. 6, Transcript in No. 600. Testimony, Transcript in No. 600, Vol. 3, p. 796.) (Finding 16. Transcript Vol. 1, p. 208.)

The order of September 6, 1906, prescribes a basis of rate-making. Its schedule is framed to secure a fixed relation between rates on the same class for different distances, a fixed relation between rates for the different classes for the same distance, and therefore manifestly a fixed relation between rates

for different classes for different distances. These relations are so stable that, given the rate for any distance on any class, the rate for any distance on any other class may be determined by one who knows the method upon which the schedule is constructed. An avowed purpose of the schedule is to secure equality of rates.

The Great Northern operates a line from St. Paul to Sioux City, Iowa, 327 miles from St. Paul, which leaves the state of Minnesota and enters the state of South Dakota at approximately 218 miles from St. Paul—the distance from St. Paul to Jasper, the border Minnesota town.

It operates another line from St. Paul to Huron, South Dakota, 294 miles from St. Paul, which leaves the state of Minnesota and enters the state of South Dakota at approximately 173 miles from St. Paul—the distance from St. Paul to Nassau, the border Minnesota town. Between St. Paul and Willmar, Minnesota, 102 miles from St. Paul, these lines are identical.

Under the schedule prescribed in the order, the progression of the rate—the haulage charge with increasing distance—breaks in half at a distance of 200 miles. That is to say, the haulage charge for first class (and for other classes in fixed relation) having been allowed at .98 cent for each five miles up to 200 miles is cut to .98 cent for each ten miles beyond 200 miles and up to 400 miles.

When the line between Minnesota and South Dakota is reached on the St. Paul-Sioux City line, the progression of the rate prescribed by the schedule is .98 cent per ten miles for first class.

When the line between Minnesota and South Dakota is reached on the St. Paul-Huron line, the progression of the rate is .98 cent per five miles.

It is apparent that, unless undue and unjust discrimination in the rates on one of these interstate lines as compared with the other is to exist, the same basis of making the rate, the same relation between rates for different distances and different classes must be maintained on one line as on the other; and, notwithstanding the 200-mile point on the St. Paul-Huron line is within the state of South Dakota, that the progression of the rate should break at that distance, as on the St. Paul-Sioux City line, whereon that distance is reached and that break is made within the state of Minnesota.

The schedule prescribes fixed relations between rates for different distances and different classes. If the relation must be adhered to within the state of Minnesota, it cannot, merely because of the intervention of a state line at one distance or another, be departed from substantially without involving undue and unjust discrimination in rates. (See Maguire's testimony Transcript in No. 600, Vol. 3, p. 795-6.) (Finding 17. Transcript Vol. 1, p. 208.)

Since the taking effect of the order of September 6, 1906, both the Great Northern and the Northern Pacific companies have reduced their interstate rates on merchandise from their eastern terminals in Wisconsin and Minnesota to all localities in general in North Dakota. Such reductions have been made as a rule only to such extent as was necessary to remedy the discrimination resulting from the fact, that the sum of the local rates from the eastern terminals to

the border towns of Minnesota and from such border towns to the several localities in North Dakota was less than the through interstate rate theretofore established and then existing from the eastern terminals to the several respective localities in North Dakota; and were not made to such extent as to remedy discrimination resulting from the fact, that in most cases the general basis of rates on merchandise for traffic within Minnesota is substantially lower than that maintained in North Dakota, or for traffic crossing the line between North Dakota and Minnesota, notwithstanding the substantial equality of conditions. Such materially lower basis of rates for transportation of merchandise within Minnesota than for that within North Dakota, and for that between the two states, still exists and constitutes undue and unjust discrimination in fact. Complaints have been made to the companies of the existence of this discrimination. [Baird, Transcript Vol. 3, 1540-1; 1467; 1523, 1527; 1464; 1507; Elliott same Vol., 1384; 1385; 1404; Maguire, Transcript in No. 600, Vol. 3, 794; 832; 841; 798; 799.] (Finding 18. Transcript Vol. 1, p. 209.)

St. Cloud, Minnesota, is on the Barnesville main line of the Great Northern and is 168 miles easterly from Moorhead, at which point this line leaves the state of Minnesota and enters the state of North Dakota. Fergus Falls, Minnesota, is on the same line, 56 miles easterly from Moorhead. Each is a distributing center, so declared by the Commission's order of May 3, 1907. Whether discrimination in fact exists between rates is determined by comparison of the rates involved. If conditions are substantially

the same, rates for like distances should be the same, and if not the same, undue and unjust discrimination in fact will exist. So far as transportation is concerned conditions are substantially the same for a distance on the Great Northern of 168 miles westerly of Fergus Falls as for the same distance westerly of St. Cloud. For that reason distributing rates from Fergus Falls to points within that distance westerly should be the same as from St. Cloud to points of equal distance westerly. Rates on articles covered by the order of September 6, 1906, from St. Cloud westerly within such distance of 168 miles are substantially lower than those maintained by the Great Northern to points in North Dakota of like distance westerly of Fergus Falls. Such disparity depends only on the fact that in the case of the higher rates the state boundary line is crossed and on no other condition whatsoever. This constitutes undue and unjust discrimination in fact, not only against the shipper at Fergus Falls, but, as well, against the consumer in the North Dakota towns in question. (Finding 19, Transcript Vol. 1, p. 210.)

Duluth, Minnesota, Superior, Ashland, Green Bay, Manitowoc, Sheboygan and Milwaukee, Wisconsin, Gladstone, Michigan, Chicago, Illinois, the Peoria, Illinois, district, the Springfield, Illinois, district, the Streator, Illinois, district, and the LaSalle, Illinois, district, are all competitive points for the distribution of coal into the state of Minnesota.

For many years rates on coal from the various distributing points to localities in southern Minnesota have borne such a relation as to admit of free com-

petition of the various distributing points and of the carriers serving them.

If the rates on coal prescribed by Chapter 232, Gen. Laws 1907, shall take effect, the result will be substantial reduction in rates on coal from Duluth to southern Minnesota localities. Such a reduction will deprive all these various distributing points in Wisconsin, Michigan and Illinois of their power to compete with Duluth in its distribution of coal in Minnesota, unless the carriers serving them shall reduce their interstate rates into Minnesota to a parity with those prescribed by Chapter 232, from Duluth. If such carriers shall reduce their interstate rates in Minnesota to a parity with the rates prescribed by Chapter 232, the relation which now exists between rates on coal from these various distributing points and localities in northern Iowa and in South Dakota will be destroyed, unless rates shall be similarly reduced from these various distributing centers to localities in these two districts. (Finding 21. Transcript Vol. 1, p. 211.)

Interstate rates on cattle, hogs, sheep and coarse grain would be affected by the rates prescribed by Chapter 232 in the same manner as has been found with regard to rates on wheat and coal. (Finding 22. Transcript Vol. 1, p. 212.)

Under the milling-in-transit privileges, so-called, owners of wheat at any point in Minnesota, North Dakota or South Dakota may pay rates equal to the sum of the rate between the point of shipment to Minneapolis and the proportional rate from Minneapolis to Chicago (for many years and at present the sum of 7.5 cents per cwt.), have it milled at Minne-

apolis and within a limited period of time forwarded to Chicago as flour.

In order to allow mills located at other towns in Minnesota to compete with Minneapolis, a milling-in-transit privilege like the privilege *via* Minneapolis has been accorded owners of wheat to ship *via* such other towns; and in many such towns mills have been established under a guaranty that rates into the towns where such mills are located, on wheat in and on flour out to Chicago shall not exceed the milling-in-transit rates from the same points to Chicago *via* Minneapolis. Chapter 232, Gen. Laws 1907, substantially reduces rates on wheat within Minnesota. The result will be, if that law takes effect, that the milling-in-transit rate from points in Minnesota *via* Minneapolis to Chicago will be automatically reduced substantially. Unless then all interstate rates between Minnesota points and Chicago, *via* interior mill towns shall be reduced to a substantial parity with the reduced milling-in-transit rate to Chicago *via* Minneapolis, Minneapolis will have a substantial advantage over the various mill towns in the interior of the state, and wheat in general as a result of this advantage will go to Minneapolis. (Finding 23. Transcript Vol. 1, p. 212.)

For some years prior to the taking effect of Chapter 97, Gen. Laws 1907, the general basis of rates for the transportation of passengers between any two points on the Northern Pacific had been three cents per mile for passengers of twelve years of age and over, and one and one-half cents per mile for passengers under twelve years of age.

Chapter 97, Gen. Laws 1907, prescribes as a maximum for transportation of passengers wholly within

the state of Minnesota two cents per mile for passengers of twelve years of age or over and one cent per mile for passengers under twelve years of age.

After the maximum rates prescribed by Chapter 97 were installed, the sum of the locals between Moorhead and other Minnesota points and Moorhead and points westerly thereof was less than the interstate rates then existing between Minnesota points and points westerly thereof.

The result of this disparity between the through interstate rate and the sum of the locals by Moorhead was this: In the first month after the taking effect of Chapter 97 the revenue for passenger business on the Northern Pacific between Moorhead and other Minnesota points increased 647 per cent over that for the corresponding month of the preceding year, while, eliminating Moorhead business, the revenue for passenger business within the state decreased 2 per cent. In June, 1907, the second month after the taking effect of Chapter 97 there were sold by the Northern Pacific 4037 tickets between St. Paul or Minneapolis on the one hand and Moorhead or East Grand Forks on the other, as compared with only 172 such tickets in the corresponding month of the year before; and in the same month, there were sold only 173 tickets between St. Paul or Minneapolis on the one hand and Grand Forks and Fargo on the other, as compared with 984 such tickets in June of the year before. In May and June, 1906, only one cash fare was collected on a train between Moorhead and St. Paul or Minneapolis; in those months in 1907 there were 1168 cash full fares and 82 cash half fares so collected.

These facts compel the conclusion that the necessary, immediate and direct effect of the operation of Chapter 97 was to deprive the Northern Pacific of a substantial amount of its interstate passenger business through Moorhead. (Finding 24. Transcript Vol. 1, p. 212.)

Notwithstanding the facility with which interstate passengers could avoid the discrimination against them by making two contracts with the company, one covering the mileage in Minnesota, discrimination in fact against the interstate passenger through Moorhead on the Northern Pacific still existed and was practiced. It existed against a passenger who, applying for a through ticket, did not know that the sum of the locals on Moorhead was less than the through rate, against the passenger with a trunk which he could not check through unless on a through ticket, and against a passenger who was compelled to use a sleeping-car.

As soon as reasonably it could do so, the Northern Pacific remedied this discrimination by reducing all its interstate fares for passenger transportation through Moorhead to an amount no greater than the sum of the locals on Moorhead. Meantime and before tariffs establishing the new reduced interstate rates had been filed, the state of Wisconsin had enacted a two cent passenger fare law, and the state of North Dakota a two and one-half cent law. The rates, therefore, newly established by the Northern Pacific between St. Paul, for example, and points in North Dakota and beyond, were in general less than the theretofore existing rates by approximately one cent per mile for the mileage in Minnesota, and one-half cent per mile for the mileage in North

Dakota. And the rates newly established by the Northern Pacific jointly with other companies, for passenger transportation between points easterly of Minnesota and points on the line of the Northern Pacific, were in general less than the rates theretofore existing by approximately one cent per mile for the mileage in Wisconsin and Minnesota and one-half cent per mile for the mileage in North Dakota.

These reductions in rates were the necessary, immediate and direct effect of the operation of the laws of the respective states above recited, not only in order that undue and unjust discrimination in rates might be avoided, but, in order also that the companies might transact interstate passenger business freely and without impairment of volume. (Finding 25. Transcript Vol. 1, p. 213.)

Prior to the taking effect of the respective orders complained of and of the two cent maximum passenger fare law, the tariffs of the Great Northern and Northern Pacific companies for transportation of passengers or merchandise in Wisconsin, Minnesota, North Dakota and South Dakota were fair as between the different states, and in each state the local tariffs were fair as compared with the interstate tariffs between such states or any two thereof. The tariffs now maintained by the companies and each of them for the transportation of commodities covered by Chapter 232 are fair as between these states, and in each state the local tariffs are fair as compared with the interstate tariffs between such states or any two thereof.

The installation of the rates prescribed by the respective orders destroyed that fairness as to merchan-

dise rates; the installation of the two cent passenger rate destroyed it as to passenger rates; and the installation of the rates prescribed by Chapter 232 would destroy it as to rates on commodities covered by that act. (Finding 26. Transcript Vol. 1, p. 214.)

It is wholly impossible for carriers situated as are the Great Northern, Northern Pacific and Minneapolis & St. Louis companies to maintain rates, or a basis of rates, or a classification of subjects of transportation, or a relation between rates for different classes of merchandise, for traffic wholly within Minnesota, materially lower than, or different from, the rates, or basis, or classification, or relation governing transportation between Minnesota and any of its neighboring states, without unjust and undue discrimination in fact against the localities in the neighboring states, and without serious impairment of the volume of the interstate business of the carriers. Such basis of rates lower within Minnesota than between Minnesota and its neighboring states would result in the promotion of the growth and prosperity of localities in Minnesota at the expense of localities in neighboring states, the enhancement of the value of property in Minnesota and serious impairment of the value of the property of all business men as well as of that of the carriers themselves in the neighboring states. (Finding 27. Transcript Vol. 1, p. 214.)

Duluth and Superior, Grand Forks and East Grand Forks, Fargo and Moorhead, and Wahpeton and Breckenridge are so situated that each pair must be considered, for the purpose of rate-making, as one locality. Both as a practical matter of the operation of a railroad and in order that undue and unjust discrim-

ination as between the members of any pair may be avoided, each city of each pair must have rates equal to those accorded to the other city. If different rates, a different classification, or a different basis of rates be lawfully prescribed by one regulating power in or out of one city of any pair from those prescribed by another regulating power in or out of the other city of the pair, the carriers serving them both must, in order to avoid undue and unjust discrimination in fact as between them, as well as to preserve their own power to transact business with each of them, adopt for each city the lower rates, or basis of rates, or classification prescribed for either city. (As bearing generally upon the foregoing findings, numbered 1 to 28, relating to the question of interference, see testimony of Staples, (Transcript Vol. 6, pp. 2646, 2649, 2650, 2704-2790, 2891, 2916.) (Finding 28. Transcript Vol. 1, p. 215.)

If it shall be necessary for the companies involved, in order that discrimination may be avoided, or in order that the companies may preserve the volume of their interstate transportation to install for their interstate business a basis of rates no higher than these respectively prescribed in the act and order complained of, and to extend the rates for their interstate long-haul business upon the principle provided in said act and order, the result will be a substantial diminution in the revenues of the companies from their interstate business. For example, for the year ending June 30, 1906, the last fiscal year prior to the taking effect of the order of September 6, 1906, the diminution in the revenue of the Northern Pacific from its interstate business in transportation of commodities

covered by Chapter 232 alone, if the basis prescribed by Chapter 232 had been applied to its rates for such interstate business, would have been $4,193,283.04; and the loss in such interstate revenue for transportation of merchandise covered by the order of September 6, 1906, if the basis prescribed by the order had been applied to its rates for such interstate business, would have been $4,119,761.96. The loss in its interstate business from passenger transportation, if the two cents maximum rate had been applied during such year, would have been $1,444,955.35. The totals of these losses, on account of the acts and orders complained of, would have been $9,758,000.35.

If, in order to prevent discrimination as between different states, it shall be necessary for the companies involved to apply to local business within other states, the same basis of rates as those prescribed for business local to Minnesota by the acts and orders complained of, the loss in revenue to the companies involved will be substantial. For example, in the year 1906, if the basis prescribed by Chapter 232 had been applied to its local business in transportation of commodities covered thereby in other states, the loss in revenue of the Northern Pacific would have been $198,540.51; and if the basis of rates prescribed in the order of September 6, 1906, had been applied to its local business in other states for transportation of merchandise covered thereby, its loss of revenue would have been $952,-644.83, or a total loss on freight of $1,151,185.34. If the two cent maximum passenger rate had been applied to its local business in other states, the loss in revenue would have been $990,908.82. Such total

loss, under the acts and orders complained of, would have been $2,142,094.16. (Finding 29. Transcript Vol. 1, p. 215.)

The main lines and branches of the Northern Pacific and Great Northern companies within the states of Minnesota and North Dakota (disregarding certain limited tracts in which grain cannot be grown, such as the Bad Lands of North Dakota) lie wholly within grain fields; and grain is shipped in substantial quantities from nearly all stations in these fields to Duluth, Minneapolis and Superior.

Shipments of coal originate at the Head of the Lakes, that is to say, Duluth or Superior, and are destined to stations in Minnesota and North Dakota.

Shipments of lumber originate at Duluth, Cloquet, Little Falls and other points in Minnesota and are destined to points throughout Minnesota and North Dakota.

Shipments of livestock originate in Minnesota, North Dakota and eastern Montana and go to South St. Paul or Chicago.

Conditions attending transportation are substantially the same as to all commodities moving eastwardly, whether the shipment originates in Montana, North Dakota or Minnesota and without regard to whether it is shipped to one of the Minnesota terminals of the carriers or to Superior, Wisconsin.

Conditions attending transportation are substantially the same as to commodities moving westwardly, whether the shipment originates at a Minnesota point or at Superior, Wisconsin, or whether it finds its destination in Minnesota or Dakota.

Because conditions attending transportation are substantially the same, any difference in the basis of rates charged for transportation of coal, whether the shipment originates at Duluth, Minnesota, or at Superior, Wisconsin, or is destined to any locality in Minnesota or in eastern North Dakota, or in the basis of rates for transportation of grain, whether the shipment originates in Minnesota or North Dakota, or is destined to Minneapolis or Duluth or Superior, or in the basis of rates for transportation of lumber, whether the shipment is destined to a point in Minnesota or to one in North Dakota, or in the basis of rates for transportation of live stock, whether the shipment originates in Minnesota, North Dakota or eastern Montana, involves an undue and unjust prejudice and disadvantage in fact against the localities subject to the higher basis of rates and an undue and unjust preference and advantage in fact to the localities given the lower basis. Establishing the rates prescribed by Chapter 232, Gen. Laws 1907, and maintaining these rates for transportation wholly within Minnesota coincidentally with the maintenance of the present interstate rates between Superior and localities in Minnesota, North Dakota and eastern Montana, and between localities in Minnesota and localities in North Dakota and eastern Montana would involve on the part of the Northern Pacific and Great Northern companies undue and unjust discrimination in fact against shippers, receivers and localities transacting the interstate business, and would seriously impair the interstate business of the carriers. If the companies shall be compelled to maintain within Minnesota the rates prescribed by Chapter 232, they will be compelled also to

reduce the basis of their interstate rates between eastern Montana and North Dakota points and Minnesota points and between eastern Montana, North Dakota and Minnesota points and Superior to a substantial parity with the basis prescribed by Chapter 232. Such reductions would be necessary to avoid undue and unjust prejudice and disadvantage in fact against shippers and localities transacting the interstate business, as well as to protect the interstate business of carriers against serious impairment.

Such reduction would have to be substantial. For example, on soft coal from Duluth to Wahpeton the present rate is $2 per ton. The rate prescribed by Chapter 232 from Duluth to Breckenridge is $1.31 per ton. That act provides that a minimum carload of soft coal shall be 30,000 pounds or 15 tons. Thus the reduction necessary to avoid this discrimination in the rate on soft coal would be $10.35 per minimum carload. (Finding 20. Transcript Vol. 1, p. 210.)

CONCLUSIONS FROM THE FACTS.

Stated in general and broad terms and speaking roughly the findings show a region a thousand miles wide of homogeneous production and consumption, producing the same things shipped to the same markets and consuming the same things bought in the same markets.

The major part of the traffic of the carriers is between states and the smaller part only is local in Minnesota. That part of the territory consisting of western Wisconsin, all of Minnesota and North and South Dakota and the eastern portion of Montana is a region

where wheat and other grain, cattle, hogs and sheep are produced and exported. This whole country ships to the same market, viz., the eastern terminals of the carriers, Minneapolis, St. Paul, Duluth and Superior. The whole region imports and consumes merchandise and coal. These are distributed throughout the territory and are brought from the same points of origin, viz., the eastern terminals before referred to. Lumber is produced in Wisconsin and Minnesota and is shipped to points in those states and into North and South Dakota and neighboring states.

The findings are emphatic and are supported conclusively by the testimony that this transportation is conducted by the carriers under circumstances and conditions substantially similar throughout the territory. There is no difference, either in cost of service, or in competition of carriers or of markets, to justify a scale of rates in one part of the territory different from those prevailing in other parts, either on the products of the country coming out, or on the coal, lumber and merchandise going in. The farmer in North Dakota or Montana competes in the same market with the farmer in Minnesota or Wisconsin. Either he must cease production, or he must have rates on his cattle, sheep and products of the soil relatively fair as compared with those charged his competitor. Nor is there any principle upon which consumers in one part of this territory can be charged rates substantially different from the rates paid by consumers in other parts upon the coal, lumber and merchandise which they import. It is equally obvious that mere intervention of a state line does not of itself constitute a ground for exacting from merchants in some towns rates substantially

higher than those charged to merchants in competing towns.

From the beginning railway carriers have recognized the obligation of these plain truths, and within each state have charged rates interstate and local which are the same upon the same articles in all parts of this territory. Grain for a hundred miles has been charged the same transportation rate whether it was carried in Wisconsin, Minnesota or the Dakotas and whether the carriage was interstate or local. So cattle, sheep, hogs, coal, lumber and merchandise have paid the same rates for similar distances, regardless of whether the carriage was between states or wholly within one of the states. The same rates have been charged to merchants in competing districts similarly situated regardless of state lines.

All these interstate rates were established as provided by acts of Congress regulating commerce among the states, were filed with the Interstate Commerce Commission and presumptively were reasonable and just in the opinion of that body. Neither the Legislature or Railroad Commission of Minnesota could pass on their reasonableness, or proceed on the theory that they are unreasonable. No more can this Court in this proceeding do likewise. These rates, the only legal interstate rates, are enjoined upon the carriers by the Interstate Commerce Law and can be challenged only in the manner prescribed by Congress, that is, before the Interstate Commission.

Every haul by a carrier involves two terminal services, one at the receiving point and one at the delivering. At each cars are delayed for loading or

unloading. For these obvious reasons and for others not necessary to go into, the freight rates per mile charged by carriers naturally are upon a lower basis for long hauls than for short. The Master says justly (Finding 10) that this is a cardinal principle of rate making; and the state rates here challenged are based upon it. Any other rule would result obviously in local rates, which added together, would be less than the through rate. This is denounced by the Interstate Commerce Law (Sec. 4 of amended act) and by the Interstate Commerce Commission in its decisions (See *Coomes v. Chicago, Milwaukee & St. Paul Ry. Co.*, 13 I. C. R. 192 and *Laning-Harris Coal & Grain Co. v. Missouri Pacific Ry. Co.*, 13 I. C. R. 154) and in its administrative order of October 14, 1910, where it is said:

> The Commission reaffirm its previously expressed view that a through rate or fare that is higher than the combination of the intermediate rates or fares is prima facie unreasonable and will insist upon the application of that principle at the earliest possible date in every instance except possible extreme and very unusual cases.

So much being established let us see just what the Legislature and Commission of Minnesota ordered to be done.

The Legislature, as to carloads of all kinds of grain, corn, flour, etc., lumber, cattle, hogs, sheep and coal and as to passengers, and the Commission, as to all

classified merchandise in carloads and less than carloads, reduced the rates local within Minnesota substantially below the local rates in the adjoining states and substantially below the interstate rates. They ordered the putting in of rates local in Minnesota materially lower than the Minnesota mileage proportion of the established interstate rates through and across the state.

This is shown graphically by the plats inserted in the back of this brief which exhibit the carriers' rates in force when the Commission's order and legislative acts were passed, also the rates fixed by the Commission and Legislature. These plats indicate to the eye the actual cuts proposed at the distances of 50, 100, 200, 300, 400 and 500 miles. The lines extending across the plats also show graphically the principle of rate progression upon which the legislative and commission rates are built up. The rates decrease with increasing distance in the manner before particularly stated. The merchandise rates fixed by the Commission extend to 500 miles and the commodity rates fixed by the Legislature to 400. In the Commission's tariff the last break or reduction of rate occurs at 400 miles and in the legislative tariff the last break occurs at approximately 300, this distance varying somewhat as between the different commodities. Following the principle before stated that rates per mile at least ought not to *increase* with increasing distance, the plats show also an extension beyond the state line, that is beyond the distances included in the state-made tariffs, of the identical rate allowed by the Legislature and Commission for the last portion of the Minnesota haul, which for practical purposes may be said to be the last hun-

dred miles. At each hundred miles on this extension beyond the state line the plats give the Northern Pacific rates charged when the testimony was taken compared with the Minnesota rate extended. If rates ought rather to decrease than to increase as distance increases, this test is more than fair to the Minnesota rates, for on the plats they are extended without reduction to distances up to 1,500 or 2,000 miles.

These plats show:

(a) That the Minnesota rates challenged are materially lower than interstate rates.

(b) That they are lower generally speaking and for all distances, except very short ones, than the mileage proportion within Minnesota of long interstate hauls, either through part of, or wholly across the state.

(c) That putting them in effect would make the sum of locals generally less than the through rate.

(d) That the principle upon which the proposed Minnesota tariffs are built is such, and the rate allowed for the last hundred miles of haul is so low, that extension of these rates to long distances results in the cutting of long haul interstate rates, roughly speaking, in half. This proves almost conclusively that, whether or not the proposed rates are confiscatory, assuming that their effects could be confined within the state of Minnesota, the rule on which they are built up is such as to make them confiscatory. Because we know of no principle of law which will justify their being raised for longer hauls beyond the boundary of the state, and not to raise them for longer hauls would result pretty obviously in bankruptcy of the railways.

The vice of the Minnesota rates lies in the lowness of increase permitted for added distance after passing 200 miles; for example, the added charges allowed by the state commodity law for the haul 300 to 400 miles are as follows: one ton of soft coal 100 miles 18c, one ton of hard coal 100 miles 24c, one ton of cattle 100 miles 44c, one ton of lumber 100 miles 24c, one ton of coarse grain 100 miles 20c, one ton of wheat 100 miles 22c. The findings show that the Minnesota interstate freight operating expenses of the Northern Pacific were $3,988,444.43 and the tons hauled one mile 960,709,494. This gives an average operating cost per ton mile of .415c. (Master's report p. *143.) The interstate freight operating expenses of the Great Northern were $6,676,725.74 and the ton miles 1,952,-426,967, giving an average operating cost per ton mile of .341c. (Master's report p. *153.) This means that on the average it cost the Northern Pacific to haul a ton of interstate freight 100 miles in Minnesota 41.5c and the same cost the Great Northern 34.1c. This finding of actual cost of operation excludes any allowance for taxes or return on the property, and is so far in excess of the charge permitted by the state law for added haul above 300 miles, as to be quite persuasive that the compensation permitted by the state law is wholly inadequate. And the extraordinary lowness of the hauling charge for distances above 200 miles permitted by the Minnesota law and by the Minnesota Commission's order is strikingly exhibited when the Minnesota rates are extended for long distances and compared with established interstate rates.

Plat A showing merchandise rates indicates that the reduction proposed increases rapidly with distance;

not only increases absolutely but in proportion or percentage. Thus at 200 miles first class rates are cut from 60c to 50.2c, second class rates from 51c to 41.8c, fifth class rates from 24c to 20.1c and class E rates from 12c to 10c. At 400 miles the reductions are: first class 96c to 69.8c, second class 83c to 58.2c, fifth class 39c to 27.9c and class E from 20c to 13.9c. At 500 miles the reductions are: first class $1.17 to 74.7c, second class $1.00 to 62.3c, fifth class 52c to 29.9c and class E 27c to 14.9c. At 1500 miles, which is about the distance from St. Paul to Spokane, there are placed on the plat the rates recently found reasonable by the Interstate Commerce Commission in the Spokane Rate Case, and put in effect by the railways in obedience to that decision: *City of Spokane v. Northern Pacific Ry. Co.*, 15 I. C. C. R. 376. At this distance the Minnesota first class extended would be $1.237, and the Interstate Commerce Commission rate is $2.50. The same rates on second class are $1.033 and $2.17. On fifth class, which includes the bulk of carload merchandise, the Minnesota rate extended would be 50c, and the Commerce Commission's rate is $1.33. On class E the Minnesota rate would be 24.9c, and the Commission's rate is 71c. The Minnesota rates extended to 1500 miles show such reductions below the interstate rates fixed by the Commerce Commission, as not only to indicate quite plainly the confiscatory character of the former, but as to exhibit in a striking manner their utter incompatibility with interstate rates established under the act of Congress.

Moreover, if the Minnesota rate be taken for 200, 300, 400 or 500 miles and compared with the inter-

state rates for double the distance or more, the Minnesota rate we think in every case will be found less than a mileage proportion of the interstate rate; for example, the Minnesota first class rate at 400 miles is 69.8c, the interstate rate first class for 800 miles is $1.78; the Minnesota rate on fifth class for 400 miles is 27.9c, for 800 miles the interstate rate is 89c and for 1200 miles $1.15; for 1500 miles the Commerce Commission rate fixed in the Spokane case is $1.33. Examples with the same showing could be multiplied, and we believe the plat shows that every merchandise rate ordered by the Commission in Minnesota for distances of 200 miles or more is less than the mileage proportion of the interstate rates for any multiple of the Minnesota distance taken. This demonstrates that the interstate rates for longer hauls, as compared with the Minnesota rates ordered by the Commission, are materially higher per mile, contrary to the fundamental rule upon which rates everywhere are made. The result of this necessarily would be to leave the through rates materially above the sum of local rates for the same haul, using the rates ordered in Minnesota as locals.

Plat B is a similar platting of the legislative coal rates and an extension thereof to longer distances, compared with the carriers' rates in Minnesota and their interstate rates for the longer distances. In respect of these rates also the discrepancy between the carriers' rates and the legislative rates widens rapidly as distance increases. The carriers' rate for 250 miles, which is the Northern Pacific distance from Duluth to Moorhead on the westerly line of Minnesota, is $2.10 on hard coal and $2.00 on soft coal,

the legislative rate $1.68 on hard coal and $1.34 on soft. At 400 miles the difference increases, the carriers' rate being $2.75 on hard coal as compared with the legislative rate of $2.16 and $2.75 on soft coal as compared with the legislative rate of $1.72. Extending the Minnesota rate to 1100 miles, which is about the distance from Duluth to Butte and Helena, Montana, we have $3.84 on hard coal and $2.98 on soft coal as compared with the established interstate rate of $6.00 on each.

The live stock rates are shown on Plat C. The Legislature made a rate within Minnesota for 400 miles of 23.3c on hogs and 20.7c on sheep in double deck cars and cattle. The Northern Pacific interstate rate into St. Paul from points 400 miles distant in North Dakota is 30½c on hogs, and 24c on sheep and cattle. The country in western North Dakota and in Montana 600 to 1000 miles distant from St. Paul is a region of large cattle shipments to the latter city. The Minnesota rate extended 1000 miles is 38.3c on hogs and 33.9c on sheep and cattle, while the Northern Pacific interstate rate 1000 miles, from Livingston, Montana, into St. Paul, is 51½c on hogs and 45c on sheep and cattle; while at the distance of 1300 miles the Northern Pacific interstate rate on hogs is 75c, the Minnesota proposed rate extended 45.8c; on cattle the railway company's rate is 65c, the legislative rate extended 40.5c.

Plat D compares the railway company's rates on wheat, flour, etc., and upon coarse grain, with the legislative rates. The carriers in the Northwest generally have charged the same rate on wheat, flour and coarse grain but the Legislature made a difference.

The plat shows that at 250 miles, which is approximately the distance over the Northern Pacific from Moorhead into Duluth or Minneapolis, the carrier charged 11½c, the Legislature fixed 10.2c on wheat and flour and 8.9c on coarse grain. At 400 miles the carriers' rate was 16c, the Legislature fixed 12c on wheat and flour and 10.6c on coarse grains. A distance of 1050 miles from St. Paul reaches the Gallatin Valley in Montana, where large quantities of barley and other grains are produced. From there the Northern Pacific rate to St. Paul is 35c, the Minnesota rate extended would be 19.1c on wheat and flour and 17.1c on coarse grains which include barley.

Plat E compares the legislative rates on lumber with the lowest lumber rates charged by northwestern carriers, namely, rates from the great present source of supply, Washington and Oregon. The plat takes Tacoma as a typical initial point. At 400 miles the Minnesota rate on lumber is 13.7c, the Northern Pacific rate from Tacoma to Yardley, the same distance, 23c; at 1000 miles the Minnesota rate extended would be 19.7c, the railway company's interstate rate from Tacoma 35c; at 1900 miles, which represents the distance from Tacoma to St. Paul and Minneapolis, the railway company's rate is 45c while the Minnesota rate extended would be 28.7c. The rates shown on this map as charged by the railway companies for distances above 700 miles were established as reasonable after full hearing, and were ordered to be put in and collected, by the Interstate Commerce Commission in *Pacific Coast Lumber Mfgs. Assocn. v. Nor. Pac. Ry. Co.*, 14 I. C. C. Rep. 23; *Potlatch Lumber Co. v. Nor.*

Pac. Ry. Co., id. 41; *Kalispell Lumber Co. v. Great Nor. Ry. Co.*, 16 I. C. C. Rep. 164.

It is shown also that in the companies' tariffs and by the order referred to of the Interstate Commerce Commission shingles bear a materially higher rate than lumber, while the Minnesota Legislature put both in the same class; so that while the Interstate Commission fixed 55 cents as the reasonable rate on shingles 1900 miles the Minnesota rate extended would be 28.7 cents.

The extensions of rates shown on said plats A to E are continuations of proposed Minnesota rates, 400 to 500 miles under the merchandise order and 300 to 400 miles under the commodity rate law. On the argument below it was suggested that this extension made an unfair comparison in case of the Great Northern and Northern Pacific because, the main lines of these companies leaving the state of Minnesota at substantially 250 miles from St. Paul, the haul in Minnesota of these companies on those lines could not exceed 250 miles; therefore that to make a fair comparison the Minnesota rate at 250 miles should be taken as the rate to be extended. We submit that the extension shown on the plats is fair (a) because there may be and are hauls in Minnesota of 400 miles on one line, and (b) because if the principle of the proposed Minnesota rates is reasonable it will stand the test of extension to 2000 miles or any greater distance of the rate allowed in Minnesota for 400 to 500 miles.

But to show how little there is in the criticism we have made and attach to this brief plats A-1, B-1, C-1, D-1 and E-1, which show extensions to longer dis-

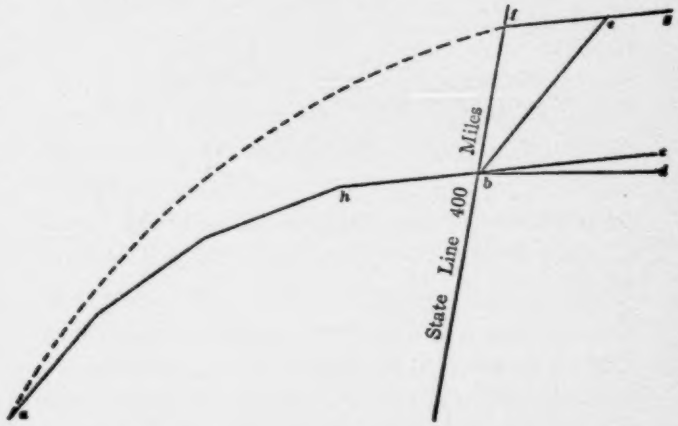
tances of the Minnesota rates for 250 miles, this being the Northern Pacific main line distance in Minnesota from St. Paul to Moorhead. As to some rates these plats show as much spread between the extended rates and the established interstate rates as do plats A, B, C, D and E. As to other rates, notably the class rates, the spread is less. But the difference is one of degree. On both sets of plats the divergence is large, showing, whichever rule of extension is used, radical and irreconcilable conflict between the proposed Minnesota rates and the interstate rates established under the act of Congress.

The decisions of the Interstate Commerce Commission fixing reasonable class rates at Spokane 1500 miles west from St. Paul, and fixing lumber and shingle rates as shown more fully in the lumber cases cited, are equivalent to an adjudication that the Minnesota rates, at least for distances above 200 miles, are utterly unreasonable; because it is plain that the rates fixed by the Commission are irreconcilable with the Minnesota rates. It cannot be doubted that should the carriers voluntarily establish, on any part of their railways, the rates on lumber ordered by the Minnesota law, the Intestate Commission would convict them promptly of gross discrimination.

Suppose a carrier obeys the state of Minnesota and puts in the rates it prescribes. Would its doing so

have any *necessary and direct* effect on the carrier's interstate rates and if so what?

This question may be elucidated by the sketch below on which the line a b represents the Minnesota Legislative rate on a haul 400 miles within the state reaching the state line at that distance. The carrier's rate in effect immediately before the legislation would be represented by dotted line between a and f and for hauls beyond the state boundary the line a f g would represent the carrier's interstate rate. Obviously, if the carrier adopts the rate a b within the state, its rates beyond must either (1) be reduced following for example line b d, or (2) remain an exact extension of the state rate as illustrated by line b c, which is line h b extended, or (3) rise abruptly at the state line from b to f, or (4) be graded up to the previous interstate rate as illustrated by the line b e.



But extending the rate beyond Minnesota on either of the first two suppositions, that is, either as indicated by b c or b d, destroys the carrier's interstate rate f g.

Yet if one of these things must happen *per force of law* [and not because of conditions not imperative on the carrier] it demonstrates, that this destruction of the interstate tariff results *directly, inevitably and necessarily* from the action of the state.

It seems too clear for argument that having adopted a b as its tariff within the state, the carrier can neither abruptly raise its tariff to f at the state boundary, or grade it up as illustrated by line b e. A carrier attempting either of these things would discriminate between localities in the plainest and grossest manner. And to do this is forbidden by the interstate commerce law. If so there is no escape from the conclusion that the legal result, and therefore the direct, necessary and inevitable result, of adopting the state rate is destruction of the interstate rate.

Attempt may be made to answer this contention by urging that the interstate commerce law and the power of Congress to regulate commerce among the states do not and cannot prohibit discrimination, as between an interstate haul and a wholly local haul within a state; that Congress has not prohibited in the commerce law and could not prohibit, for example, a discrimination in favor of Moorhead as against Fargo with respect of traffic originating in Minnesota; that the power of Congress to prohibit discrimination as between Moorhead and Fargo is restricted to traffic which is interstate *to both towns,* that is, which comes to both from Chicago or Superior or other point beyond Minnesota; that the Interstate Commission cannot compare with local rates to find interstate rates discriminatory; that for these reasons the interstate rates are not forced down by law and therefore not

directly or *necessarily* forced down as the result of adopting the state rates.

The constitution of the United States thus construed would be puny indeed. It is difficult to treat such a contention with respect. It comes to this: that the United States has no power to prevent each state from passing laws discriminating in favor of its own industries as against those of other states and from building up its own local internal commerce by the destruction of commerce among the states; and no power to prevent interstate carriers from creating the same discriminations. The contention ignores the evils, which history tells us were the main reasons for giving the United States control of commerce among the states. In fact, the first purpose of the commerce clause in the federal constitution was to put an end to discriminatory legislation of the states against the people and commerce of other states, which before the constitution had been too common.

In 9 Wheaton at p. 11 Webster is reported to have said, in his argument to this Court in the case of *Gibbons v. Ogden:*

> Few things were better known, than the immediate causes which led to the adoption of the present constitution; and he thought nothing clearer, than that the prevailing motive was to regulate commerce; to rescue it from the embarrassing and destructive consequences, resulting from the legislation of so many different states, and to place it under the protection of a uniform law. The great objects were commerce and revenue; and they were objects indissolubly connected. By the confederation, divers restrictions had been imposed on the states; but these had not been found sufficient. No state, it was true, could

send or receive an embassy; nor make any treaty; nor enter into any compact with another state, or with a foreign power; nor lay duties, interfering with treaties which had been entered into by congress. But all these were found to be far short of what the actual condition of the country required. The states could still, each for itself, regulate commerce, and the consequence was, a perpetual jarring and hostility of commercial regulation.

In the history of the times, it was accordingly found, that the great topic, urged on all occasions, as showing the necessity of a new and different government, was the state of trade and commerce. To benefit and improve these, was a great object in itself; and it became greater, when it was regarded, as the only means of enabling the country to pay the public debt, and to do justice to those who had most effectually labored for its independence. The leading state papers of the time are full of this topic. The New Jersey resolutions (1 Laws U. S. p. 28) complain, that the regulation of trade was in the power of the several states, within their separate jurisdiction, in such a degree as to involve many difficulties and embarrassments; and they express an earnest opinion, that the sole and exclusive power of regulating trade with foreign states, ought to be in congress. Mr. Witherspoon's motion in congress, in 1781, is of the same general character; and the report of a committee of that body, in 1785, is still more emphatic. It declares that congress ought to possess the sole and exclusive power of regulating trade, as well with foreign nations, as between the states. (Ibid. 50.) The resolutions of Virginia, in January 1786, which were the immediate cause of the convention, put forth this same great object. Indeed, it is the only object stated in those resolutions. There is not another idea in the whole document. The entire purpose for which the delegates assembled

at Annapolis, was to devise means for the uniform regulation of trade. They found no means, but in a general government; and they recommended a convention to accomplish that purpose. Over whatever other interests of the country this government may diffuse its benefits, and its blessings, it will always be true, as a matter of historical fact, that it had its immediate origin in the necessities of commerce; and for its immediate object, the relief of those necessities, by removing their causes, and by establishing a uniform and steady system. It would be easy to show, by reference to the discussions in the several state conventions, the prevalence of the same general topics; and if any one would look to the proceedings of several of the states, especially, to those of Massachusetts and New York, he would see, very plainly, by the recorded lists of votes, that wherever this commercial necessity was most strongly felt, there the proposed new constitution had most friends. In the New York convention, the argument arising from this consideration was strongly pressed, by the distinguished person whose name is connected with the present question.

The Court said in its opinion, p. 231:

> If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the states free from all invidious and partial restraints.

In the *Passenger Cases*, 7 How. 283, it was said, p. 445:

> Before the Constitution existed, the States taxed the commerce and intercourse of each other. This was the leading cause of abandoning the Confederation and forming the Constitution, —more than all other causes it led to the result.

In *Welton v. State of Missouri*, 91 U. S. 275, it was said, p. 280:

> It will not be denied that that portion of commerce with foreign countries and between the States which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the General Government was to insure this uniformity against discriminating State legislation. The depressed condition of commerce and the obstacles to its growth previous to the adoption of the Constitution, from the want of some single controlling authority, has been frequently referred to by this court in commenting upon the power in question. "It was regulated," says Chief Justice Marshall, in delivering the opinion in *Brown v. Maryland*, "by foreign nations, with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the Federal Government to enforce them became so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal Government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress."

Attention is called also to statements of similar import made by Chief Justice Marshall in the opinion in *Brown v. Maryland*, 12 Wheat. on p. 446.

The commerce power being granted to the United States to prevent the evils stated, familiar decisions have established "the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States." Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 197; *Champion v. Ames*, 188 U. S. 321, 347.

In *County of Mobile v. Kimball*, 102 U. S. 691, on p. 696 the court, through Mr. Justice Field, speaking of the extent of the commerce power, said:

> That power is indeed without limitation. It authorizes Congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries, and between the citizens of the several States, and to adopt measures to promote its growth and insure its safety. And as commerce embraces navigation, the improvement of harbors and bays along our coast, and of navigable rivers within the States connecting with them, falls within the power. The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the States which consists in the transportation, purchase, sale, and exchange of com-

modities. Here there can of necessity be only one system or plan of regulations, and that Congress alone can prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. There would otherwise be no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens, and against the products and citizens of other States. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the States was to insure uniformity of regulation against conflicting and discriminating State legislation.

In *Gloucester Ferry Company v. Pennsylvania,* 114 U. S. 196, on p. 203 the court, through the same learned Justice, said:

Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them, which are local and limited in their nature or sphere of operation, the States may pre-

scribe regulations until Congress intervenes and assumes control of them; yet, when they are national in their character, and require uniformity of regulation affecting alike all the States, the power of Congress is exclusive. Necessarily that power alone can prescribe regulations which are to govern the whole country. And it needs no argument to show that the commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by State legislation. Otherwise, there would be no protection against conflicting regulations of different States, each legislating in favor of its own citizens and products, and against those of other States. It was from apprehension of such conflicting and discriminating State legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the States was vested in Congress.

In *Robbins v. Shelby Taxing District,* 120 U. S. 489, on p. 493 the court, through Mr. Justice Bradley, said:

It is also an established principle, as already indicated, that the only way in which commerce between the states can be legitimately affected by state laws, is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, limbs, health, and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities; the passage of inspection laws to secure

the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the state or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce or with some other employment or business exercised under authority of the Constitution and laws of the United States; and the imposition of taxes upon all property within the state, mingled with and forming part of the great mass of property therein. But in making such internal regulations a state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the state from abroad, or from another state, and not yet become part of the common mass of property therein; and no discrimination can be made, by any such regulations, adversely to the persons or property of other states; and no regulations can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to Congress over the subject.

For authorities on this last head it is only necessary to refer to those already cited.

In a word, it may be said, that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject.

In *Northern Securities Co. v. United States*, 193

U. S. 197, Mr. Justice Harlan, speaking for the court, on p. 349, said:

> The question of the relations of the General Government with the States is again presented by the specific contention of each defendant that Congress did not intend "to limit the power of the several States to create corporations, define their purposes, fix the amount of their capital, and determine who may buy, own and sell their stock." All that is true, generally speaking, but the contention falls far short of meeting the controlling questions in this case. To meet this contention we must repeat some things already said in this opinion. But if what we have said be sound, repetition will do no harm. So far as the Constitution of the United States is concerned, a State may, indeed, create a corporation, define its powers, prescribe the amount of its stock and the mode in which it may be transferred. It may even authorize one of its corporations to engage in commerce of every kind; domestic, interstate and international. The regulation or control of purely domestic commerce of a State is, of course, with the State, and Congress has no direct power over it so long as what is done by the State does not interfere with the operations of the General Government, or any legal enactment of Congress. A State, if it chooses so to do, may even submit to the existence of combinations within its limits that restrain its internal trade. But neither a state corporation nor its stockholders can, by reason of the non-action of the State or by means of any combination among such stockholders, interfere with the complete enforcement of any rule lawfully devised by Congress for the conduct of commerce among the States or with foreign nations; for, as we have seen, interstate and international commerce is by the Constitution under the control of Congress, and it belongs to the legislative department of the Government to prescribe rules for the conduct of that commerce.

If it were otherwise, the declaration in the Constitution of its supremacy, and of the supremacy as well of the laws made in pursuance of its provisions, was a waste of words. Whilst every instrumentality of domestic commerce is subject to state control, every instrumentality of interstate commerce may be reached and controlled by national authority, *so far as to compel it to respect the rules for such commerce lawfully established by Congress.* No corporate person can excuse a departure from or violation of that rule under the plea that that which it has done or omitted to do is permitted or not forbidden by the State under whose authority it came into existence. We repeat that no State can endow any of its corporations, or any combination of its citizens, with authority to restrain interstate or international commerce, or to disobey the national will as manifested in legal enactments of Congress. So long as Congress keeps within the limits of its authority as defined by the Constitution, infringing no rights recognized or secured by that instrument, its regulations of interstate and international commerce, whether founded in wisdom or not, must be submitted to by all.

The Interstate Commerce Commission on this point has said (*Reliance Textile & Dye Works v. Southern Ry. Co.*, 13 I. C. R. 48 pp. 53-4):

> The complainant alleges that the defendants, or some of them, who participate in these through rates to Chicago and to the Ohio River have made unduly low local rates from the producing mill to the southern dyeing establishment. That one upon which the complaint seems to dwell more than other is a rate of 17 cents per 100 pounds from South Carolina mills to Clearwater. Clearwater is situated in the State of South Carolina, although it takes the rate applicable to Georgia points, and since these low rates from the mills to Clearwater are state rates, the defendant in-

sists that we have no jurisdiction of this aspect of the case.

To this we can not agree. The same lines participate in all these rates from the mill to the dye works of the complainant and its competitor, and from these in turn to the points of consumption. When a discrimination, forbidden by the act to regulate commerce, arises from an adjustment of state and interstate rates, carriers subject to our jurisdiction and participating in the interstate rates can not escape responsibility by claiming that the discrimination is accomplished through a reduction of the state rate so long as that reduction is voluntary. They were answerable for the effect produced by the combination of rates, all of which they control.

The Southern Railway, for example, names the rate from the producing mill in South Carolina to the works of the complainant at Cincinnati, and it also names the rate from the same mill to the Clearwater works in South Carolina. Its duty is to treat, in the matter of transportation, both these operations with fairness. It can no more shut up the industry of the complainant by unduly reducing the state rate made to its competitor than by unduly advancing the interstate rate which the complainant itself is required to pay.

This must certainly be so where the state rate is voluntarily made, and we think that the same conclusion must finally be reached where the state rate is made by state authority. A state can no more improperly prefer an industry within its borders as against an industry located without by the imposition of an improper freight rate than the Southern Railway can unduly prefer that industry in its own interest.

In face of the rule that the power over commerce with foreign nations and among the states is vested in Congress as absolutely as if there were no states, it is impossible to maintain either that Congress could

not prohibit, or that it has not prohibited by the commerce act, discriminations between interstate rates and rates local within a state.

What has been said should be a demonstration that, because railway carriers by the Interstate Commerce Law are prohibited from discriminating between localities, they cannot charge more per mile for long hauls extending across Minnesota and into other states than they charge for shorter hauls on the same lines of railway wholly within the state; that they cannot charge into or out of towns in Minnesota materially lower rates than those charged into or out of towns in neighboring states similarly situated; that they cannot charge materially higher rates on grain and other products to a farmer on a line of railway, like that of the Great Northern just west of the Red River in North Dakota, than on a parallel line just east of the river in Minnesota, where the distance from market and all the other circumstances and conditions of transportation are identical; that they cannot charge Superior, Wisconsin, higher rates than Duluth, Minnesota, which is four miles from Superior and on the opposite side of a state line; that they cannot charge the North Dakota cities of Grand Forks, Fargo and Wahpeton materially higher rates, either in or out, than they charge to the opposite Minnesota cities, East Grand Forks, Moorhead and Breckenridge; that they cannot charge a shipper of cattle from Miles City,

Montana, to St. Paul, a higher rate per mile than they charge a shipper of the same kind of property over a part of the same line from Moorhead to St. Paul, merely because the shorter haul is wholly within Minnesota; that where conditions are the same, materially higher rates upon interstate traffic cannot coexist with lower rates upon local traffic, and that the legal prohibitions against discrimination must destroy one set of rates or the other.

The reason carriers cannot so discriminate is not that pursuit of their interest forbids, or that competition of carriers forbids, but that the law of Congress prohibits. What the law requires certainly is necessary. *If the law requires* a reduction and readjustment of interstate rates, provided the carriers accept the Minnesota rates, such readjustment is the *immediate, direct* and *necessary* result of putting in the Minnesota rates.

If extensive and substantial reductions of the interstate rates are forced because of the state legislation and Commission's orders, the effect of that legislation and those orders is to remove from Congress and from the Commission, created under its authority, all control of the interstate rates. The state traffic and the interstate traffic of these railways is so inextricably commingled and must remain so commingled, that it really is one single and indivisible thing; and legislation of a state going to the extent of this, under the circumstances surrounding the interstate and local traffic proven in the record, cannot be doubted in point of fact to have, not only a direct, immediate and necessary, but a destructive effect on interstate rates, on the volume and movement of interstate commerce,

and upon the right and ability of these railway companies to transact that commerce.

To illustrate the argument consider the Red River Valley, which lies partly east of the Red River in Minnesota and partly west of it in North Dakota. It is traversed by north and south railways, some wholly in Minnesota, some wholly in North Dakota, one on one side of the river through part of the valley crossing to the other side through the remainder. The people on each side of the river are engaged in the tillage of the soil, the raising of domestic animals and the production of butter, milk and cheese. These products find their market largely at the terminals of the carriers in Minnesota or Wisconsin or east of there, so that most of the transportation from west of the river is interstate, while most of that from east of the river is local to Minnesota. Rates to market from the west side of the river cannot coexist with materially lower rates from the east side for similar distances. Rates so differing are incompatible and the lower inevitably will destroy the higher. Therefore, if Minnesota has an *unlimited* power to fix the rates to and from the territory within its borders east of the river, in utter disregard of the fates which the Interstate Commerce Commission may have fixed as reasonable from the country west of the river, it is certain; either that Minnesota has the power to depopulate and destroy the towns and farms west of the river and destroy the interstate commerce of the carriers serving them; or that the local Minnesota rate must be made the interstate rate, in which case regulation and maintenance of the interstate rate by the Commission created by Congress is a theoretical

and empty power, instead of a real and efficient one as the constitution intended. "The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge;" In re *Rahrer,* 140 U. S. 545, 562; *Champion v. Ames,* 188 U. S. 321, 358.

The operation on interstate commerce of the Minnesota laws and orders is shown to be immediate, direct and substantial in the following respects: (a) in destroying interstate rates; (b) in destroying interstate commerce, either by preventing all commerce in certain goods, or by building up local in lieu of interstate production and movement; (c) in turning over to one competing carrier the interstate commerce of another, which would occur as shown, unless all the carriers adopt the state rates for interstate business; (d) in destroying interstate commerce of other states and cities in other states, unless the carriers serving them adopt for their interstate business the Minnesota rates.

THE LAW OF THE CASE.

Thus far we have confined the discussion mainly to, and have endeavored to state the facts in the record, and to draw therefrom conclusions of fact, which seem to us necessarily to follow. We come now to consider what rules of law are to be applied to these facts, believing that we need invoke no novel principle and that doctrines well established by decisions of this Court are sufficient for the determination of the case.

We may be permitted to quote Mr. Justice Moody's interesting statement of the history and reasons for the commerce clause in the federal constitution. In the *Employers' Liability Cases*, 207 U. S. 463, 519, the learned Justice said:

> It hardly needs to be said that the inability of the National Government, created by the Articles of Confederation, to deal effectively with commerce was one of the efficient causes of the call for the constitutional convention. No doubt the most urgent need of that time was a central government with powers adequate to control foreign commerce, but interstate commerce was not overlooked, though its principal importance then consisted in its relation to foreign commerce. (Federalist, No. 42, by Mr. Madison.) No one could then have foreseen the extent of the interstate commerce of our times, for no one could foretell the employment of the forces of steam and electricity which have so wonderfully aided its development. But the statesmen of that time, confident of the future and hopeful that they might devise a government which would endure, must have understood that the commerce which concerned more than one State, from its essential nature, was in part outside the territorial jurisdiction of any State, could not be governed efficiently by a single State, and, if left outside of

the National control, would be subject to woeful embarrassment by the conflicting regulations of the several States into which it entered. It appears in the reports of the debates that these dangers were appreciated by the members of the convention, so far as they threatened that part of the commerce among the States which was conducted by water transportation, then the only part of such commerce of sufficient importance to attract public attention. But fortunately the spirit of the nation builder and not of the code maker inspired and dominated the convention. Its members were not content to frame a system of laws sufficient for the present moment, which might in a few years become unsuited to or inadequate for the needs of the people. They undertook rather the task of devising a scheme of government and of allotting the powers usually exercised by governments between the existing States and the prospective Nation. Whenever such a power came under consideration its nature was examined, and it was then placed in the hands of that governmental agency which it was supposed could exercise it most advantageously. This very power furnishes a signal illustration of the method pursued. The convention did not determine how interstate commerce should be regulated but rather who should regulate it, and left, with certain limitations, the necessity, extent and nature of the regulation to the contemporaneous knowledge, wisdom and discretion of the body in whom the power was vested. We may well believe that, contemplating the subject with the enlarged vision of those who are building for a future unknown or dimly discerned, and seeing clearly that interstate like foreign commerce was, in the words of the resolutions with which Randolph opened the deliberations of the convention, a matter "to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of indi-

vidual legislation," the convention was constrained to associate the two together in every draft of the Constitution proposed, and place them with the Indian trade, under the control of the National legislature. Madison's Journal, Scott's edition, pp. 67, 161, 164, 185, 362, 453, 654, 656, 704, 753.

The different kinds of commerce described have the common qualities that they are more extensive than the jurisdiction of a single State and liable to injury from conflicting state laws, and thereby are all alike distinguished from the purely internal commerce of the States. There is nothing in the words of the grant that permits the belief that the power is not coextensive over foreign, interstate, and Indian trade, or is anything less than the whole power which any government may properly exercise over either, though it may well be that the restrictive parts of the Constitution, its prohibitions and reservations, may operate differently on different kinds of commerce, or even on different aspects of the same kind of commerce.

It is said that Congress has never before enacted legislation of this nature for the government of interstate commerce on land, though it has for the government of such commerce upon the water and for the government of foreign commerce; that on the contrary the relations affected have been controlled by the undoubted power of the States to govern men and things within their respective dominions; and that this omission of Congress is of controlling significance. The fundamental fallacy of this argument is that it misunderstands the nature of the Constitution, undervalues its usefulness, and forgets that its unchanging provisions are adaptable to the infinite variety of the changing conditions of our National life. Surely there is no statute of limitations which bars Congress from the exercise of any of its granted powers, nor any authority,

save that of the people whom it represents, which may with propriety challenge the wisdom of its choice of the time when remedies shall first be applied to what it deems wrong. It cannot be doubted that exercise of a power for the first time may be called upon to justify itself. The fact that it is for the first time is a circumstance to be considered. But in this case it is a circumstance whose significance disappears in the light of history. Henry Adams, a writer of high authority, in the first chapter of his History of the United States, has drawn a vivid picture of the conditions of our National life at the beginning of the nineteenth century. The center of population was near Baltimore. The interior was almost impenetrable except by the waterways and two wagon roads from Philadelphia to Pittsburg and from the Potomac to the Monongahela. The scattered settlements of what was then the Western country were severed from the seaboard settlements by mountain ranges, and there was little connection between the two almost independent peoples. There was scarcely a possibility of trade between the States except along the seacoast and over the dangerous and uncertain rivers. "The experience of mankind," says the author, p. 7, "proved trade to be dependent on water communications, and as yet Americans did not dream that the experience of mankind was useless to them." We need not look beyond these conditions for an explanation why Congress, though it early and vigorously exercised its power of legislation over foreign commerce and interstate commerce by water, left it unused in respect to interstate commerce on the land. As population multiplied, bringing the isolated settlements nearer to each other, wealth increased, creating a wider demand for commodities, and roads and bridges came to be better and more numerous, doubtless overland commerce was somewhat stimulated. But the iron restrictions which na-

> ture had placed upon land transportation remained constant until they were unloosed by the operation of the steam railroad. The system of steam transportation began modestly by the construction of short lines, often wholly within a single State. These lines were lengthened by extensions and consolidations, until at the present time the States of the Union are all bound together by a network of interstate railroads. Their operation, aided by the quick and cheap transmission of the mails, and the communication of intelligence by electricity, has transformed the commerce of the country. Interstate commerce by land, once so slight as to be unworthy of the attention of the National legislature, has come to be the most important part of all trade, and it is not too much to say that the daily needs of the factory and the household are no longer dependent upon the resources of the locality, but are largely supplied by the products of other States.

Mr. Justice Moody says that railways have been lengthened by extensions and consolidations until the states are bound together by a network of interstate railroads. It is true also that this condition has been brought about by necessity and by the requirements of economy. The wonderful development and consequent commerce which we see today could not have been built up, had each railway and each contract for carriage been confined within the limits of a single state. The public opinion of the country and the policy of the states have favored extensions and consolidations, and in that respect have been in accord with business requirements. Commercial needs have required long hauls and through routing, and the laws of the states have authorized and favored the combination and consolidation of connect-

ing carriers and the creation and extension of large systems crossing many states. No just complaint can be made therefore by the states against such exertion of the national power over these interstate railways and their business as existing actual conditions require.

Coming first to consider what has been decided touching the commerce power, it is naturally found that, as in the beginning there was little commerce by land among the states, Congress undertook first the regulation of commerce by water. In the *License Cases,* 5 How. 504, decided in 1847, it apparently was assumed that the states had the power to regulate interstate commerce in so far as Congress had not acted, but in 1851 the case of *Cooley v. Board of Port Wardens,* 12 How. 299, laid down the rule that state power was limited to such matters as did not admit of uniform regulation; and that as to all matters of interstate commerce susceptible of uniform regulation the non-action of Congress indicated its intention that commerce among the states should be unregulated and free; *Henderson v. Mayor,* 92 U. S. 259; *Robbins v. Shelby Taxing District,* 120 U. S. 489.

In 1851 in the case of *The Propeller Genesee Chief v. Fitzhugh,* 12 How. 443, and in the later case of *The Steamboat Magnolia,* 20 How. 296, the navigable water of the United States was held to include the Great Lakes and to extend to the rivers, though wholly within a state, which were highways of commerce between states. These decisions did not interpret the power of Congress over commerce, determining only the extent of the federal admiralty jurisdiction. But this Court in a number of cases has expressed the opinion that the power of Congress to regulate com-

merce was as extensive as the admiralty jurisdiction. Thus the power of Congress was sustained to regulate the Daniel Ball, a steamboat plying on a river wholly within the state of Michigan; *The Daniel Ball,* 10 Wall. 557. The act of Congress of 1890, prohibits "the creation of any obstruction, not affirmatively authorized by the law, to the navigable capacity of any waters in respect to which the United States has jurisdiction", thus supplying that action of Congress without which the court in earlier cases (see *Escanaba v. Chicago,* 107 U. S. 678) had held the states might authorize obstructions to navigable waters within their borders.

In the exercise of its powers over navigation Congress has assumed *exclusive* jurisdiction of all waters forming highways of commerce between states; *Wisconsin v. Duluth,* 96 U. S. 379, 387; has required all steam vessels running on the navigable waters of the United States to be licensed regardless of whether they carry commerce among the states; *The Daniel Ball, supra; The Oyster Police Steamers,* 31 Fed. 763; has regulated the contractual relations of employer and employe; *Patterson v. Bark Eudora,* 190 U. S. 169; and of owners and shippers; *In re Garnett,* 141 U. S. 1.

The original view of the court seems to have been that the source of the power of Congress over navigation was the grant of power to regulate commerce. Certainly this was the view taken in *Gibbons v. Ogden,* 9 Wheat. 1, where the full and exclusive control of Congress over navigation on the navigable waters of the United States, even those lying wholly within the boundaries of a state, was established and planted upon the commerce power. There is no suggestion in the

opinion that any other power need be resorted to, Chief Justice Marshall saying, p. 204:

> It is obvious, that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the states, may use means that may also be employed by a state, in the exercise of its acknowledged powers; that, for example, of regulating commerce within the state. If congress license vessels to sail from one port to another, in the same state, the act is supposed to be, necessarily, incidental to the power expressly granted to congress, and implies no claim of a direct power to regulate the purely internal commerce of a state, or to act directly on its system of police.

In the case of *White's Bank v. Smith*, 7 Wall. 646, the court sustained the act of Congress requiring recording in the collector's office of bills of sale and mortgages of vessels and rested it upon the commerce power, saying, p. 656:

> Congress having created, as it were, this species of property, and conferred upon it its chief value under the power given in the Constitution to regulate commerce, we perceive no reason for entertaining any serious doubt but that this power may be extended to the security and protection of the rights and title of all persons dealing therein. The judicial mind seems to have generally taken this direction.

In *The Daniel Ball, supra,* the court alluded to no power in Congress except that to regulate commerce. Two questions were presented and decided (a) whether the river was a navigable water of the United States and the act of Congress therefore applicable and (b) whether the act of Congress could apply to a vessel

navigating wholly within the limits of Michigan, but carrying goods going out of the state and coming in from other states. On page 564 the court said touching the first question:

> If we apply this test to Grand River, the conclusion follows that it must be regarded as a navigable water of the United States. From the conceded facts in the case the stream is capable of bearing a steamer of one hundred and twenty-three tons burden, laden with merchandise and passengers, as far as Grand Rapids, a distance of forty miles from its mouth in Lake Michigan. And by its junction with the lake it forms a continued highway for commerce, both with other States and with foreign countries, and is thus brought under the direct control of Congress in the exercise of its commercial power.
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> That power authorizes all appropriate legislation for the protection or advancement of either interstate or foreign commerce, and for that purpose such legislation as will insure the convenient and safe navigation of all the navigable waters of the United States, whether that legislation consists in requiring the removal of obstructions to their use, in prescribing the form and size of the vessels employed upon them, or in subjecting the vessels to inspection and license, in order to insure their proper construction and equipment. "The power to regulate commerce," this court said in *Gilman v. Philadelphia,* (3 Wall. 724), "comprehends the control for that purpose, and to the extent necessary, of all navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation of Congress."

As here shown, the court in *Gilman v. Philadelphia,* 3 Wall. 713, had placed squarely on the commerce

power the authority of Congress over navigable waters forming a highway between states.

So in *Patterson v. Bark Eudora*, 190 U. S. 169, where the court considered congressional legislation regulating seamen's wages, the opinion delivered by Mr. Justice Brewer, at page 176, plants the legislation upon the power of Congress to regulate internal as well as foreign commerce.

In the case of *The Lottawanna*, 21 Wall. 558, at page 577, the court, by Mr. Justice Bradley, in speaking of the power of Congress to change the maritime law, said:

> It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed. The scope of the maritime law, and that of commercial regulation are not coterminous, it is true, but the latter embraces much the largest portion of ground covered by the former. Under it Congress has regulated the registry, enrollment, license and nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of shipowners for the negligence and misconduct of their captains and crews; and many other things of a character truly maritime. And with regard to the question now under consideration, namely, the rights of material-men in reference to supplies and repairs furnished to a vessel in her home port, there does not seem to be any great reason to doubt that Congress might adopt a uniform rule for the whole country, though, of course, this will be a matter for consideration should the question ever be directly presented for adjudication.

All these cases had referred to the commerce power the congressional legislation involved; and whilst in the cases of *Butler v. Boston Steamship Co.*, 130 U. S. 527, decided in 1888, and *In re Garnett*, 141 U. S. 1, decided in 1891, the act of Congress limiting liability of vessel owners was justified under a power to amend the maritime and admiralty law, said to be in Congress because of the grant of admiralty jurisdiction to the federal courts, there is no intimation in these cases that the act could not be justified solely on the commerce power. It can hardly be doubted that these acts can be sustained as regulations of commerce, and in fact the commerce power seems their most satisfactory foundation. For if Congress has a broader authority than the commerce power it must come from Article 3, Section 2, of the constitution, which says that the *judicial* power "shall extend * * * to all cases of admiralty and maritime jurisdiction;" and it is difficult to maintain that a grant of power to the courts is in any sense a grant of legislative power to Congress, for this would apparently involve the assertion, that by the grant of power to the courts to try actions between states, between citizens of different states and between aliens and citizens of a state, Congress was given power to pass the laws applicable to those controversies. On the other hand, it is not difficult to justify the congressional legislation touching waters and navigation considered as founded on the power to regulate commerce.

It thus appears that Congress has exercised an exclusive power over the national waterways, even those lying wholly within a state, and an exclusive power

over the vessels plying on those waterways, even those vessels engaged wholly in local commerce or not carrying any commerce. To the extent that such congressional regulation operates on commerce purely local within a state, and on vessels not carrying goods or passengers at all, this Court in *Gibbons v. Ogden* justified the regulation, not as indicating any power in Congress to act on local boats and commerce directly, but as a necessary incident to its regulation of commerce among the states; on the ground that, the power over interstate commerce being complete and not partial, being paramount, and being otherwise impossible of exercise, extended *incidentally* over local boats and commerce. It may well be impossible to regulate navigation effectually by regulating part only of the boats navigating. Rules of navigation, to be effectual for protection of vessels engaged in commerce among the states and with foreign nations, must control the vessels sailing the same waters though not engaged in that commerce. And for this reason Congress may control the whole. The case of *The Hazel Kirke*, 25 Fed. 601, the opinion in which delivered by Judge Benedict was concurred in by Mr. Justice Blatchford, fully sustains this contention.

The principle was outlined in *Gibbons v. Ogden*, where Chief Justice Marshall said (9 Wheat p. 195):

> The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not neces-

> sary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.

And on page 203 the court, in speaking of inspection, quarantine and health laws as well as laws for regulating internal commerce of the state, said:

> No direct general power over these objects is granted to congress; and, consequently, they remain subject to state legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be, where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious, that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the states, may use means that may also be employed by a state, in the exercise of its acknowledged powers; that, for example, of regulating commerce within the state. If congress license vessels to sail from one port to another, in the same state, the act is supposed to be, necessarily, incidental to the power expressly granted to congress, and implies no claim of a direct power to regulate the purely internal commerce of a state, or to act directly on its system of police.

We know of no principle on which it can be maintained, nor of any opinion of this Court upon which it can now be contended, that the power of Congress derived from the commerce clause is less extensive or less potent over land commerce than over that carried on by water. Touching this the court said in *The Daniel Ball*, p. 565:

> It is said that if the position here asserted be sustained, there is no such thing as the domestic trade of a State; that Congress may take the entire control of the commerce of the country, and extend its regulations to the railroads within a State on which grain or fruit is transported to a distant market.
>
> We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation. And we answer further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the States, when that agency extends through two or more States, and when it is confined in its action entirely within the limits of a single State. If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a State, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a State, and leaving it at the boundary line at the other end, the Federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter.

That the control of Congress over land commerce is identical with and as complete as its control over water commerce was affirmed in *Monongahela Navigation Company v. United States*, 148 U. S. 312, where it was said on p. 341:

> Notice to what the opposite view would lead: A railroad between Columbus, Ohio, and Harrisburg, Pennsylvania, is an interstate highway, created under franchises granted by the two States of Ohio and Pennsylvania, fran-

chises not merely to construct, but to take tolls for the carrying of passengers and freight. In its exercise of supreme power to regulate commerce, Congress may condemn and take that interstate highway; but in the exercise of that power, and in the taking of such property, may it ignore the franchises to take tolls, granted by the States, or must it not rather pay for them, as it pays for the rails, the bridges, and the tracks? The question seems to carry its own answer. It may be suggested that the cases are not parallel, in that in the present there is a natural highway; while in that suggested it is wholly artificial. But the power of Congress is not determined by the character of the highway. Nowhere in the Constitution is there given power in terms over highways, unless it be in that clause to establish post-offices and post-roads. The power which Congress possesses in respect to this taking of property springs from the grant of power to regulate commerce; and the regulation of commerce implies as much control, as far-reaching power, over an artificial as over a natural highway. They are simply the means and instrumentalities of commerce, and the power of Congress to regulate commerce carries with it power over all the means and instrumentalities by which commerce is carried on. There may be differences in the modes and manner of using these different highways, but such differences do not affect or limit that supreme power of Congress to regulate commerce, and in such regulation to control its means and instrumentalities. We are so much accustomed to see artificial highways, such as common roads, turnpike roads and railroads, constructed under the authority of the States, and the improvement of natural highways carried on by the general government, that at the first it might seem that there was some inherent difference in the power of

> the national government over them. But the grant of power is the same. There are not two clauses of the Constitution, each severally applicable to a different kind of highway. The fee of the soil in neither case is in the general government, but in the State or private individuals. The differences between the two are in their origin—nature provides the one, man establishes the other.

The court in *California v. Central Pacific Railroad Co.*, 127 U. S. 1, (see Mr. Justice Bradley at p. 39) held in terms that the power of Congress over land commerce was identical with its control over water commerce. In the case of *Debs,* 158 U. S. 564, the opinion was grounded on the complete identity of the two powers (see Mr. Justice Brewer, pp. 589-591). Mr. Justice Moody in the quotation before made from his opinion in the Employers' Liability Cases demonstrates that the two are equal branches of the same power, springing from one clause of the constitution—not from different clauses.

The opinion in *Gibbons v. Ogden* indicates clearly the view of the court that the internal commerce of the states, whether water commerce or land commerce, is subject to regulation by Congress, wherever such regulation is incidental to the exercise by Congress of its power over commerce among the states, wherever the regulation affects other states and is necessary for the purpose of executing a general power of the government. In the language of the court it is only the *"completely"* internal, the *"exclusively"* internal and the *"purely"* internal commerce of the state which is left to its exclusive regulation, and it is clearly inferable from the opinion that there may be internal com-

merce within a state which is not *completely*, and *exclusively* and *purely* internal, and which, whenever it ceases so to be and to the extent that it ceases so to be, is subject to regulation by the national government.

This understanding of *Gibbons v. Ogden* was stated by Chief Justice Savage in *Steamboat Company v. Livingston*, 3 Cow. 713, at p. 745, as follows:

> It is evident from these expressions, that the Supreme Court was of opinion, that over a part of the internal commerce of the states, congress has power. Precisely how far that power extends, it did not become necessary to decide; but from the expressions, *completely internal, exclusively internal,* and *purely internal,* it is clearly inferrible, that all that part of the internal commerce of a state which is not *exclusively internal,* is subject to the regulation of congress. How far, then, within the state, does that commerce extend, which is not *completely* internal? If all commerce which enters the exterior lines of a state, is internal, and exclusively so, then all commerce would be included, as well foreign as among the states, which is directly contrary to the decision and to the constitution. The counsel for the appellants contended, if a steam vessel from another state with a coasting license, has a right to enter a port in this state, that, at the exterior port, the voyage is terminated as between the states and that she cannot proceed to any other place within the state, except in subjection to the exclusive grant. His honor the Chancellor decides, that such a vessel may proceed to any port in this state, and depart from any port in this state and proceed to another, and touch at intermediate places; and that the navigation which is subject to the state grant is that which takes place between any two points in this state, when the voyage is not a continuation of a passage to or from another state. The Supreme

Court says, "if congress license vessels to sail from one port to another, in the same state, the act is supposed to be necessarily incidental to the power expressly granted to congress, and implies no claim of a direct power to regulate the purely internal commerce of a state, or to act directly on its system of police."

The power of congress to license vessels to sail from one port to another in the same state, is here distinctly asserted, as incidental to the power directly granted. It seems, also to be, impliedly at least, admitted, that this is a regulation of commerce within a state, and subject to a state legislation. It is elsewhere asserted, that the power to regulate commerce with foreign nations, and among the states, is necessarily an exclusive power. From what is here said, it seems that the incidental power to regulate commerce within the state is a concurrent power; and if so, it is admitted, that in case of collision, the law of congress must prevail. But the opinion here seems to consider the purely internal commerce as not affected by the act of licensing vessels to sail from port to port within the state. If this be so, then the internal commerce over which the state has exclusive control, is something existing where coasting vessels cannot come, or have no right to navigate, as in the case of a ferry within the state. And hence it follows, that the commerce among the states, which congress has power to regulate, either directly or incidentally, is that commerce which may be carried on by vessels regularly licensed by the laws of congress; or, in other words, the coasting trade.

That the power of Congress extends over the internal commerce within each state to whatever extent is necessary to efficient and full control over commerce among the states and with foreign nations, was stated in *Gibbons v. Ogden* as a doctrine of general applica-

tion; not as being confined to commerce by water. And the court must have intended this rule to be universal, because without some extension over local commerce the power of the United States may be ineffective over the matters committed to its exclusive control by the constitution. It is a principle just as necessary to the control of Congress over land commerce as to its control over water commerce.

For example, consider the power of Congress to require safety appliances on railway trains. Interstate commerce moves and must move on the same rails with local commerce and largely in the same trains and cars. If it be true that a car engaged wholly in local commerce unequipped with automatic couplers, being incapable of coupling to cars engaged on the same road in interstate commerce, delays or endangers interstate commerce or the employes engaged therein, and if it be true that engines run without power brakes wholly in local commerce endanger interstate passengers and freight, or the engines, cars and employes carrying on interstate commerce on the same rails, who will doubt the power of Congress over *all* the cars and engines? That power rests on the same reasons that sustain the power of Congress to regulate all the boats navigating the public waters. If the ships engaged in local commerce carry different lights, or navigate by different rules from those carrying commerce among the states, interstate commerce may be endangered; and for this reason Congress has a right to extend its control to the local commerce. This becomes, in such a case, a necessary incident to the expressly granted power. Equally Congress may say, that engines and cars run without safety devices in local commerce

endanger or impede interstate commerce moving on the same rail highway, and may comprise within its regulations *all* the cars and engines.*

There is no more difficulty in extending the power of Congress, in cases of similar necessity, over the rates of interstate carriers local within a state. The difficulty is one of fact, not of law. If only it be shown necessary in fact for Congress to exercise a control over rates local within a state, in order to make effectual its undoubted control over interstate rates, it must be held, following *Gibbons v. Ogden,* that Congress has power to the extent of the necessity, over what otherwise belongs to the state.

And far from this doctrine being novel or revolutionary, the very question was involved in and put at rest by *McCulloch v. Maryland,* in which case the inquiry was whether the taxing power of a state must give way where it impedes the power of Congress to regulate the currency. In that case Chief Justice Marshall said, 4 Wheat. p. 426:

> On this ground, the counsel for the bank place its claim to be exempted from the power of a state to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds. This great principle is, that the constitution and the laws made in pursuance

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**Southern Railway Company v. The United States,* Oct. 31, 1911, decided by this Court after this was written.

thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, &c.

And again on p. 427:

That the power of taxing it (the bank) by the states may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is intrusted to the discretion of those who use it. But the very terms of this argument admit, that the sovereignty of the state, in the article of taxation itself, is subordinate to, and may be controlled by the constitution of the United States. How far it has been controlled by that instrument, must be a question of construction. In making this construction, no principle, not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.

And the following language was used at pp. 435-6:

It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the states, will equally sustain the right of the states to tax banks chartered by the general government. But the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the

> states, and the states themselves, are represented in congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme. * * *
>
> The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

In *Gibbons v. Ogden*, p. 204, Chief Justice Marshall applied the same all pervading principle to state navigation laws and inspection laws, saying that such laws must give way so far as necessary to the complete control of Congress over commerce. And the court in many cases has reaffirmed these doctrines saying, for example, through Mr. Justice Harlan in *International Text Book Co. v. Pigg*, 217 U. S. 91, p. 112, "It is the established doctrine of this court that a State may not, in any form or under any guise, direct-

ly burden the prosecution of interstate business." See also *Atlantic Coast Line v. Wharton*, 207 U. S. 334, *Asbell v. Kansas*, 209 U. S. 254, and *Flint v. Stone Tracy Co.*, 220 U. S. 107.

We have shown that in 1819 in the case of *McCulloch v. Maryland* it was established that the taxing power of the states is subordinate to and must give way to the power of Congress to regulate the currency and that in 1824 in *Gibbons v. Ogden* it was established that state control over navigation, also over state inspection laws, is subordinate to and must give way to the power of Congress to regulate commerce. The power of the states to levy taxes, their power to regulate navigation within their borders and their power to pass inspection laws are sovereign powers essential to every government, having an importance and sanctity at least equal to the state power over railway rates. And it cannot be questioned that the court, when it announced its judgment in *McCulloch v. Maryland*, intended to say in unmistakable language that the constitution of the United States and the laws made in pursuance thereof control *every* power of and *every* exercise of power by a state.

State power to fix rates is as much controlled by the commerce clause of the constitution of the United States as by other provisions of that instrument such as: (a) that a state shall pass no law violating the obligation of a contract; (b) that no state shall deprive any person of life, liberty or property without due process of law, or deny to any person the equal protection of the law.

By virtue of these prohibitions in the constitution of the United States a state cannot exercise its power

to fix rates so as to violate the obligation of a contract, or so as to take property without due process of law, or deny the equal protection of the law. State rate regulations are just as much subject to the power of Congress over commerce with foreign nations and among the states, and when in conflict with must yield to federal constitutional laws and regulation.

The rule is universal, that the powers of Congress extend incidentally over the internal affairs of the states and control state powers and state action, so far as may be necessary to execute, at all times and under all conditions, *every* authority vested in Congress by the constitution. We have in *United States v. Coombs,* 12 Peters 72, decided in 1838, a distinct announcement of this rule. In that case the question was whether the Circuit Court of the United States had jurisdiction to punish one who, contrary to the act of Congress, had plundered a wrecked vessel, the offence having been committed above high water mark. The court, through Mr. Justice Story, sustained the act of Congress, not under the grant of admiralty and maritime jurisdiction, but under the commerce clause. In speaking of the commerce power the court said:

> It does not stop at the mere boundary line of a state, nor is it confined to acts done on the water, or in the necessary course of the navigation thereof. It extends to such acts done on land, which interfere with, obstruct, or prevent due exercise of the power to regulate commerce and navigation with foreign nations and among the states. Any offence which thus interferes with, obstructs, or prevents such commerce and navigation, though done on land, may be punished by Congress, under its general authority to make

all laws necessary and proper to execute their delegated constitutional powers.

Mr. Justice Van Devanter in the case of *The St. Louis Iron Mountain & Southern Railway Company v. R. P. Allen et al.*, and three other cases, in August, 1908, is reported to have said in answer to counsel's question as to just how far the Railroad Commission of Arkansas had power to go in view of the injunction which the court had ordered in 163 Fed. 141:

> Well, I appreciate, Mr. Cohn, it is an embarrassing situation, because (while it may be somewhat ex cathedra) as I say I think it is very difficult for the Commission to act in the existing situation. Interstate traffic and intrastate traffic, going as it does over the same roadbed; originating at the same stations and the same station-house, being very frequently handled by the very same people, going over the road in the same trains, the confusion, the interweaving and intermingling of these two classes of traffic is so very complete that in my personal judgment I am unable to see any method at all whereby there can be a satisfactory separation and division of the cost or of the use of the original investment.
>
> But we have this situation: Congress has entire authority over interstate commerce, and the states have a like authority over intrastate. It is said, in a great many cases, where there is a slight impinging of one upon the other, that, as the law of Congress made in pursuance of the federal constitution is supreme, that such impinging as is incident to the exercise by Congress of its full authority, it is necessarily contemplated by the constitution therefore, that the authority vested in the state is subordinate to that. If you were to go a little bit farther and apply that here, taking as your premise that the authority of Congress is supreme and therefore in respect of inter-

> state commerce its authority shall be everywhere equally dominant, I am not sure but what the result would be in some instances where there is such a confusion, such an interweaving, as that there could not be a separation, there the power of Congress would be the dominant power and that the other power would not exist; not on the theory that Congress has any authority over intrastate rates, but that since its authority over interstate commerce must reach in every part and parcel of it, Congress may say that anything that gets interwoven with it must partake of the exercise of that authority. Otherwise the power of Congress which is supreme would not be supreme. We have some practical illustrations of that. Congress has exercised its authority by saying that cars engaged in interstate commerce shall be equipped with prescribed safety appliances. The states have (some of them) said that cars engaged in interstate traffic shall be equipped with safety appliances of a prescribed character. It is a matter of common knowledge that no car can in actual practice be equipped with two kinds of safety appliances. It is a matter of common knowledge that the same car very often carries both interstate and intrastate commerce. That being true, which law shall be dominant, as applied to that car? The federal law or the state law? They cannot both apply; that is impossible. Therefore, the federal law is the dominant one.

So much for the power of Congress. Turning now to the exercise of that power we find, that by the act to regulate commerce among the states (Sec. 3) Congress forbids carriers to make or give any undue or unreasonable preference or advantage to any person, to any locality, or to any description of traffic. This in terms includes persons and places of one state

as compared with those of other states, traffic among states as compared with similar traffic local to any state, and prohibits not *some* but *all* undue or unreasonable preference or advantage. To this extent it is a complete exercise of the power vested in Congress. We find also that the act creates a commission with power over transportation among the states, compels carriers in the first instance to file and publish their own rates, and gives the commission power to alter these and by order to establish other rates in the manner provided. The rates established in either manner become the lawful rates (*Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426) and are equally rates in respect of which the carrier by the act is forbidden to discriminate. If therefore the facts show that the state-made local rates do create undue and unreasonable discrimination, as compared with the rates between states established by and in obedience to the act of Congress, the act of Congress forbids in terms a carrier to adopt the state-made rates. And this establishes a conflict and collision between the lawful exercise of congressional power and the exercise of state power.

It must be admitted, that the power of Congress is paramount, and that where its exercise collides with what otherwise would be a lawful exertion of state power, the latter must give way. *McCulloch v. Maryland*, 4 Wheat. p. 405-6, 426; *Gulf, Colorado & Santa Fe Railway Company v. Hefley*, 158 U. S. 98; Mr. Justice Harlan in *Northern Securities Co. v. United States*, 193 U. S. pp. 332-3, 335-6, 347; *Gibbons v. Ogden*, pp. 195, 209; Chief Justice Taney in the *License Cases*, 5 How, p. 574-5.

A recent application of this principle is found in *State v. Chicago, Milwaukee & St. Paul Ry. Co.*, 136 Wis. 407. It appeared in that case that employes of the railway company, telegraphers and others, who were engaged in both interstate and local commerce, fell under an act of Congress regulating their hours of labor, and also under an act of Wisconsin dealing with the same subject. It was held that the act of Congress controlled exclusively and that the state's control, even over its local commerce, must yield to the paramount power of Congress; that Congress had power to regulate and had regulated the hours of labor of the employes in question, in such a manner as necessarily to exclude regulation by the State of Wisconsin.

To the same effect is *Baltimore & Ohio Railroad Company vs. Interstate Commerce Commission*, 221 U. S. 612, where Mr. Justice Hughes used the following language:

> But the argument, undoubtedly, involves the consideration that the interstate and intrastate operations of interstate carriers are so interwoven that it is utterly impracticable for them to divide their employees in such manner that the duties of those who are engaged in connection with interstate commerce shall be confined to that commerce exclusively. And thus, many employees who have to do with the movement of trains in interstate transportation are, by virtue of practical necessity, also employed in intrastate transportation.
>
> This consideration, however, lends no support to the contention that the statute is invalid. For there cannot be denied to Congress the effective exercise of its constitutional authority. By virtue of its power to regulate interstate and for-

eign commerce, Congress may enact laws for the safeguarding of the persons and property that are transported in that commerce and of those who are employed in transporting them. *Johnson v. Southern Pacific Company,* 196 U. S. 1; *Adair v. United States,* 208 U. S., pp. 177, 178; *St. Louis & Iron Mountain Railway Company v. Taylor,* 210 U. S. 281; *Chicago, Burlington & Quincy Railway Company v. United States,* decided May 15, 1911.

Between the doctrine of the case last cited and that held in *Southern Railway Company v. The United States,* Oct. 31, 1911, it is difficult to find a distinction. Both cases rest on the all pervading principle of *McCulloch v. Maryland* that the constitution and laws of the United States are supreme and modify every power and every exertion of power by states to whatever extent is necessary to maintain that supremacy.

In a recent car distribution case before the Commerce Court (*Pennsylvania Railroad Company v. Interstate Commerce Commission,* decided December 5, 1911) it was contended that the order of the commission was void because it operated on cars not engaged in commerce among the states. But, because the cars were used indiscriminately in local and interstate commerce, as market and other business conditions dictated from day to day, and without regard to the boundaries of the state in which the traffic originated, the court held the orders validly applicable to all the cars; saying (we think correctly) that this followed from the opinion in *Interstate Commerce Commission v. Ill. Cent. R. R.,* 215 U. S. 452, where this Court (see pp. 473-4) rejected the contention that

commerce among the states in the constitutional sense embraces only interstate shipments, and held that it includes the carriers engaged in interstate commerce and all the cars and other instrumentalities by which it is carried on.

It may be urged that our contention would give the United States and the National Commission complete control of commerce local within the states. But no such contention need be made in this case nor, we submit, will that result follow from adopting our contention. What we have said thus far is that the tariffs upon commerce among the states made in pursuance of the act of Congress, together with all rules laid down in the act touching that commerce, must prevail over state regulation, even of the traffic within its borders, to whatever extent is necessary to preserve the national authority over the subjects committed to the nation by the constitution. To whatever extent any state regulation of traffic within its own borders destroys, or directly interferes with the control by national authority of interstate traffic, or directly destroys, hampers, or impedes the free movement of interstate commerce, the state regulation must give way. Certainly this is no novel assertion, but is a necessary rule abundantly supported by decisions of this Court. It is simply the application to railway rates of doctrines well established as to other features of congressional regulation of commerce among the states. This particular application of established principles is new, only because Congress but recently undertook the regulation of railway rates and it is not strange that it has not been made before. It could not perhaps have been made before the Act of

Congress of June 29, 1906, giving the Commerce Commission power to fix rates, and certainly not before state regulation was attempted which could be proven to have a substantial and direct effect on interstate commerce.

The recent opinion of Judge Trieber in the Arkansas rate case, 187 Fed. Rep. 290, rests on the facts of that case, which Judge Trieber distinguishes from this, saying the evidence before him did not establish *direct* operation upon interstate commerce of the local Arkansas rates. We need not challenge the doctrine of that opinion, that a state police regulation is not void where it affects only incidentally the commerce clause or any other provision of the federal constitution, or the execution of any act of Congress passed under power granted by the constitution.

We rely on the rule that any state action, police or otherwise, is inoperative if it directly regulates commerce among the states, or if it directly interferes with regulation of that commerce by Congress or under its authority. The distinction was drawn clearly in the case of *Louisville & Nashville Rd. Co. v. Eubank*, 184 U. S. 27, where the court says, at p. 36:

> We fully recognize the rule that the effect of a state constitutional provision or of any state legislation upon interstate commerce must be direct and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the State to a point within it, or from a point within to a point without the State, interstate commerce is thereby affected, and may be thereby to a certain extent directly regulated, and in that

> event the effect of the provision is direct and important and not a mere incident.

The whole question is one of fact. Have we established direct, necessary and substantial effect on interstate commerce, or only remote, indirect, incidental, or unsubstantial effect?

But Judge Trieber is wrong in saying that our contention leaves local commerce within a state free from control, either by the state or nation. For our contention is; that so far as such control is necessary and incidental to regulation of commerce among the states, the nation may exercise it; and that outside of this incidental (but effective) power of Congress complete authority remains in the states, subject to the restraint that a state must exercise its power so as not to come into direct and irreconcilable collision with congressional regulation of commerce among the states.

In *Louisville & Nashville R. Co. v. Siler,* 186 Federal, the Circuit Court, on page 199, put the legal question thus:

> Whether a business or economic policy of a railroad company, as distinguished from a legal duty, to change its interstate rates to correspond with just and reasonable local rates imposed by the state for the transportation of traffic originating and ending wholly within the state, can be said to be a direct, and not merely an indirect, effect of the state's action.

In the Siler case the court, in considering the record before it, took the view that any change in interstate rates brought about by the local Kentucky rates imposed by the commission would be the result of business or economic policy of the railway com-

panies, and that on the facts in that record there was no proof that the carriers were bound to change their interstate rates as a matter of legal duty. The court said that any such effect resulting from business or economic policy of carriers would be an indirect one. For the purposes of this case we need not question that view. But it seems, to say the least, doubtful. Business conditions may be practically as imperative as legal obligations. We have contended that in this case the carriers are proven to be under legal obligation to change their interstate rates, if they adopt the state rates. But independent of that, they have a constitutional right to carry and to hold, unhampered by state interference, all the interstate commerce they have and can get. It is found and cannot be doubted that they must surrender much of that commerce, should they conform to the Minnesota law and continue to maintain the interstate tariffs previously in effect. The state law is shown thus directly to destroy interstate commerce, to change its movement from one carrier to another, and to take it away from one city conferring it on another. In this view the state regulation acts directly on interstate commerce, *unless carriers intervene and prevent that result by changing their interstate rates.* This seems to bring the case within the tests laid down in *Louisville & Nashville R. R. Co. v. Eubank,* 184 U. S. 27. It was said in that case, p. 40, to be no answer to the railway company's contention that it could get the interstate business by lowering its rates to fit the state regulation, the court asking "Is it bound, in order to secure this interstate commerce, to lower its rates all through the State?" In that case the court held the state regula-

tion invalid upon two distinct grounds: (a) as stated p. 41, "But the fact which vitiates the provision is that it compels the carrier to regulate, adjust or fix his interstate rates with some reference at least to his rates within the State"; (b) as stated pp. 41-42, "It seems also to be thought that there is no regulation of commerce, provided it is not interfered with or regulated in all ways by which transportation of commodities between interstate localities may be accomplished; that if the commodity (tobacco in this case) can be transported by any other means or route, or by any other individual or corporation than the one affected by the regulation, commerce is not regulated within the constitutional meaning. On the contrary, it seems quite clear that any law which in its direct result regulates the interstate transportation of a single individual carrier, or company of carries, violates the provision in question; that it is no answer to say the commodity can still be transported by another carrier or by water instead of rail, so long as the direct effect of the state legislation is to regulate the transportation of the commodity by a particular means, by rail instead of by water, or a particular individual or company."

We repeat, that the whole question is one of fact. If we have failed to prove on this record either that extensive changes in interstate rates will necessarily be consequent, as a matter of legal duty imposed on the carriers, upon their putting in the local state rates, or that the local state rates directly and necessarily affect the free flow of interstate traffic, we have failed to make a case. Our whole contention is rested

on a record containing, as we submit, convincing proof which the court said was absent in the Siler case.

Certainly it cannot be maintained that Congress is devested of control over interstate commerce, or that its control over such commerce is in the least restricted, because its regulation of that commerce may incidentally affect matters otherwise wholly within the control of the states. The court did not hesitate to dissolve the Northern Securities Company because its decree operated upon local commerce within states to the extent that the Northern Pacific and Great Northern were engaged in local commerce; and *Swift v. United States*, 196 U. S. 375, shows that the court will not hestitate to enjoin a violation of the trust law, notwithstanding local commerce is affected. The decree which the court rendered in *New York, New Haven & Hartford R. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, could not be executed without necessary and considerable effect upon local commerce within states. So the commodities clause decision has made it necessary for railways to divorce themselves from mining operations, this divorce incidentally but necessarily extending to coal shipped locally within the states. The forced reorganization of the Standard Oil Company and of the American Tobacco Company cannot but affect greatly local commerce within the states; but that is no objection to the decrees against those corporations.

It has been asserted that our contention is foreclosed because this Court has held the power of the states to regulate their internal commerce to be absolute and beyond the control of the nation. But we submit with confidence that no such decision ever has been made.

It is plain that *Gibbons v. Ogden* at least is to the contrary. And let us see what other cases relied on say.

In *Munn v. Illinois*, 94 U. S. 113, at p. 135 the court said:

> It was very properly said in the case of the *State Tax on Railway Gross Receipts*, 15 Wall. 293, that "it is not every thing that affects commerce that amounts to a regulation of it, within the meaning of the Constitution." The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in State as well as those engaged in inter-state commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with inter-state commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce, outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a State, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress in respect to inter-state commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done.

In *Chicago, Burlington and Quincy Railroad Company v. Iowa*, 94 U. S. 155, at p. 163 the court said:

> The objection that the statute complained of is void because it amounts to a regulation of commerce among the States, has been sufficiently considered in the case of *Munn v. Illinois*. This

road, like the warehouse in that case, is situated within the limits of a single State. Its business is carried on there, and its regulation is a matter of domestic concern. It is employed in State as well as in inter-state commerce, and, until Congress acts, the State must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without may be indirectly affected.

In *Peik v. Chicago and North-western Railway Company*, 94 U. S. 164, at p. 177 the court said:

> As to the effect of the statute as a regulation of interstate commerce. The law is confined to State commerce, or such inter-state commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to inter-state commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally, these may reach beyond the State. But certainly, until Congress undertakes to legislate for those who are without the State, Wisconsin may provide for those within, even though it may indirectly affect those without.

In *Stone v. Farmers' Loan & Trust Company*, 116 U. S. 307, at p. 325 it is said:

> It is now settled in this court that a State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or inter-state commerce.

and again at p. 334:

> Under this rule nothing can be done by the government of Mississippi which will operate as a burden on the inter-state business of the company or impair the usefulness of its facilities for inter-state traffic. It is not enough to prevent the State from acting that the road in Mississippi is used in aid of inter-state commerce. Legislation of this kind to be unconstitutional must be such as will necessarily amount to or operate as a regulation of business without the State as well as within.

In *Smyth v. Ames,* 169 U. S. 466, it was said, p. 523:

> While a State has power to fix the charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by valid contract, or unless what is done amounts to a regulation of foreign or interstate commerce, such power is not without limit.

In *Georgia Railroad and Banking Company v. Smith,* 128 U. S. 174, it was said, p. 179:

> It has been adjudged by this court in numerous instances that the legislature of a State has the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of any provision in the charter of the company constituting a contract vesting in it authority over those matters, subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation; and that what is done does not amount to a regulation of foreign or interstate commerce.

Mr. Justice Harlan, speaking for the court, in the Northern Securities case, p. 349, said:

> The regulation or control of purely domestic commerce of a State is, of course, with the State, and Congress has no direct power over it so long as what is done by the State does not interfere with the operations of the General Government, or any legal enactment of Congress. * * * But neither a state corporation nor its stockholders can, by reason of the non-action of the State or by means of any combination among such stockholders, interfere with the complete enforcement of any rule lawfully devised by Congress for the conduct of commerce among the States or with foreign nations; for, as we have seen, interstate and international commerce is by the Constitution under the control of Congress, and it belongs to the legislative department of the Government to prescribe rules for the conduct of that commerce. * * * No corporate person can excuse a departure from or violation of that rule under the plea that that which it has done or omitted to do is permitted or not forbidden by the State under whose authority it came into existence.

It would seem clear that, from *Gibbons v. Ogden* down, the court, whenever its attention was drawn to state regulation as affecting the power of Congress, said uniformly that action of a State, even as to commerce wholly within its borders, is invalid to the extent that it operates directly upon interstate commerce; that the power of a state is limited to such regulation as is confined to commerce *completely, exclusively* and *purely internal;* and that Congress has a right to act on commerce local within the states to the extent that such action is necessary to complete, exclusive and effective control of interstate and foreign commerce.

To the extent that the *Granger Cases* sustained the power of the state to fix that part of an interstate rate within its borders they were overruled in *Wabash Ry. Co. v. Illinois,* 118 U. S. 557, where the court said, that in the *Granger Cases* the validity of the state legislation, as against the objection that it operated upon interstate commerce, received no elaborate consideration either by the court or counsel. But the case of *Munn* and those decided with it and the case of *Stone v. Farmers' Loan & Trust Company* show that the court never intended to extend those decisions to cases involving the essential differentiating facts we have here, viz., (a) action instead of non-action by Congress, (b) proof in the record that the state legislation in point of fact *does* operate directly and necessarily upon commerce among the states.

The case of *Wabash Ry. Co. v. Illinois* overrules the intimation in *Railroad Company v. Maryland,* 21 Wall. 456, that a state "unchallenged and unchallengeable" might fix the charge for transportation of freight and passengers between Baltimore and Washington.

General statements in opinions, that the states have power to fix railroad rates on local transportation within their borders, must be considered with reference to the facts and questions before the court in the cases where those words were used. Such expressions used before the recently granted power of the Interstate Commerce Commission to fix the rates upon commerce among the states are far from conclusive, for Congress now has acted. It is very certain also that in none of the cases heretofore decided by the federal courts sustaining state power over local rates has it been shown, as is proven in this record,

that a state has undertaken to reduce local rates within its borders materially below the interstate rates in, out of and through the state, upon traffic, the transportation of which is under circumstances and conditions similar to those governing local traffic. In no previous case has it been made to appear that a state has reduced the rates within its borders far below a mileage proportion of longer haul interstate rates through and across the state. Nor has extensive destruction of interstate rates fixed in pursuance of the act of Congress been proven in any previous case to be the necessary and direct result of state action. Short haul rates are properly and usually higher than long haul rates; local rates are properly and usually higher than interstate rates because usually local hauls are much shorter than interstate. The state reductions of local rates, considered in previous decisions such as *Smyth v. Ames,* did not force rates within a state below the basis of long haul through rates. No general change of interstate rates would be necessitated by such reductions and therefore the essential objection to state action here urged was not, and could not have been, urged in cases heretofore determined.

The decisions in *Western Union Telegraph Company v. The State of Kansas,* 216 U. S. 1, *Pullman Company v. State of Kansas,* 216 U. S. 56, *Ludwig, Secretary of State of Arkansas v. Western Union Telegraph Company,* 216 U. S. 146, are most emphatic announcements that state regulation, even though confined in terms to local commerce within its borders, is void, if in fact it trammels or burdens interstate commerce, and that the power of local regu-

lation in the states is subordinate to and must yield to the paramount power of Congress over commerce among the states. The court said, 216 U. S., on p. 26:

> The authorities cited show that this court has guarded with both diligence and firmness the freedom of interstate commerce against hostile state or local action, as such action has been manifested by regulations operating, in some instances, directly, in others indirectly, upon the means or instruments employed in that commerce. This has been done without violating the principle that an interstate carrier, entering a State for purposes of its business, is subject to local regulations that in their essence and purpose only incidentally affect interstate commerce, but are established in good faith for the protection, safety, comfort and convenience of the people, are not in themselves in any real, just sense an obstruction to or in conflict with the substantial rights of those engaged in interstate commerce, but are referable to the police powers of the State, and to be respected until Congress covers the subject by legislation.

Again on p. 27:

> But it is said that none of the authorities cited are pertinent to the present case, because the State expressly disclaims any purpose by the statute in question to obstruct or embarrass interstate commerce, but seeks only to prevent the Telegraph Company from entering the field of domestic business in Kansas without its consent and without conforming to the requirements of its statute. But the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the

> statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction as the adjudged cases abundantly show.

and finally on p. 37:

> We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct only local business. It is of the last importance that the freedom of interstate commerce shall not be trammelled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general right of the States to regulate their strictly domestic affairs is fundamental in our constitutional system and vital to the integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the General Government, and not in hostility to rights secured by the Supreme Law of the Land.

But it will be urged that the proviso of the first section of the Interstate Commerce Act, reading,

> *Provided, however,* That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, deliver-

> ing, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory, as aforesaid.

makes it evident that, if Congress had the power to forbid the discrimination, which would result from obedience to the state laws and orders, it did not exercise it. If we are correct, Congress had ample authority to forbid discriminations brought about by differences between interstate and local rates, but no direct authority to prohibit discriminations caused by difference in rates for transportation wholly within a state. The natural and reasonable construction of this proviso is, that it was inserted out of abundant caution to make sure that the broad terms of the act did not go beyond the constitutional power of Congress and directly regulate commerce within the states. Certainly the proviso does not indicate that Congress intended to exercise less than its full power to prevent discriminations in or against the transaction of commerce among the states; or less than its full power to prevent the favoring of any state at the expense of the people of the whole country. Doubtless the effect of the proviso is that the Interstate Commission is given no direct power over rates local within the states; but we do not contend that it has such power nor is that contention necessary to maintain our argument. Doubtless Congress intended to leave the states with power to fix rates within their borders, but the proviso does not grant them power so to fix them as to destroy interstate commerce, or break down and render nugatory the regulation of carriers and the rates established by the National Commission.

In short the proviso is neither a grant of power to the States, nor to be construed to diminish the power which the act granted the Interstate Commission. Certainly it is beyond belief that the act of Congress, while prohibiting carriers from discriminating, contained a grant of direct authority to each state to create against the people of other states and their traffic whatever discrimination it chooses.

Also it has been said that if the state rate is reasonable of itself that fact defeats our contention: and therefore the sole inquiry is whether the state rate is reasonable considered by itself. The plain answer to this is that there is no way to determine mathematically and beyond controversy whether any given rate is reasonable of itself. We have no agreed measure or standard for such determination. Congress has set up a standard—the published tariff and the findings of the interstate commission. This standard controls rates between states, and any state rate inconsistent with or destructive of interstate rates so fixed is conclusively unreasonable *measured by that standard.*

It is not out of place to call the attention of the court to the frank avowal of the Board of Railroad Commissioners of Iowa in their report for the year ending December 7, 1909. To hold that Congress is powerless and that this Court is powerless to prevent the discriminations against interstate commerce here attempted would be to invite all the states to embark on the protection of home industries through the regulation of railway rates, as the Iowa Commission frankly says it has been doing and will continue

to do. On page 14 of the report the Commission of Iowa says:

> The complexities involved in the making of intrastate freight rates make the subject an exceedingly difficult one. It will be remembered that selfishness has not been eliminated from the business world. A superficial investigation of intrastate rate making might lead one to believe that frequently the interests of different classes of business conflict.
>
> Many shippers of live stock, grain, etc., desire an exceedingly low interstate rate in order to carry the products of Iowa to the great distributing markets on the lake and seaboard. Many of those engaged in manufacturing industries desire a low interstate rate on the raw material to be shipped from outside the state and a high interstate rate on the manufactured product in order to keep their competitors out of the territory of Iowa.
>
> Many of those interested in the coal mines of Iowa and in their operation believe that Iowa coal interests require a high interstate rate in order to protect them from the competition of coal mined in Illinois and other states.
>
> An application was made to this Commission, requesting a revision of the intrastate rates on grain and flour. Many shippers objected to this because of certain interstate rate features connected with these products, and before the case could be heard it was practically withdrawn.
>
> The above instances are cited merely to show that the problem of making rates which will be perfectly satisfactory to all parties in interest upon the principle which governs in Iowa, is a very difficult one.
>
> The first principle which ought to be adopted by an Iowa rate making body and which ought to be and always has been in the mind of this Commission in every rate adjustment, is that

every Iowa industry should be protected to the utmost limit of the power of this board. The Commission believes that if the doctrine of protecting home industries is good for the nation, it is good for the state. Every manufacturing interest in Iowa should be fostered and encouraged and Iowa shippers should not be placed, in any respect whatsoever, to any disadvantage as compared with a shipper who lives outside the state. If this principle be correct, and we believe it is, this board should use its power and its influence in building up home industries to the end that the raw material produced in Iowa should be manufactured at home, thus giving employment to Iowa labor and investment for Iowa capital.

As an illustration of our theory we have constantly contended that it was wise to foster and encourage packing houses all over the state. In order to do this there should be an exceedingly low intrastate rate on live stock, especially hogs. We believe that wisdom requires the rate making power of this Commission to be so used as to enable packing houses to slaughter the hogs of Iowa at home and ship the manufactured product. In order to accomplish this purpose we have been less interested in the interstate rate on hogs than in the intrastate rate. It is much more important, in order to maintain packing houses in Iowa, that the freight rate within the state for short distances be a low one, than it is to have the interstate rate so low that it will result in taking the hogs raised in this state to Chicago and other distributing centers for packing purposes. This theory is simply in perfect harmony with the doctrine of protecting home industries which undoubtedly reflects the thought and belief of a large majority of the people of Iowa. We believe in extending this theory still further to the encouragement of manufacturing enterprises throughout the state of Iowa.

In addition to this frank avowal, there have been numerous instances where state railway commissions and legislatures have fixed local rates, either with the avowed purpose, or with the necessary and direct result, of forcing extensive changes of interstate rates and of the movement of commerce among the states. These instances are numerous enough to show that the Minnesota situation is not the only one where the government and its laws are prostrated by the exercise of local authority. Some of them are as follows:

(a) *In Matter of Freight Rates,* 11 I. C. R. 209, where Memphis claimed to have been deprived of its interstate commerce into Arkansas by the Arkansas Commission reducing the rates from Little Rock and Pine Bluff in that state below a point which the Interstate Commerce Commission thought reasonable.

(b) The exactly similar case of *Saunders v. Southern Express Company,* 18 I. C. R. 415, where it was shown that the Alabama Railroad Commission reduced fish rates from Mobile to about one-half the rates fixed by the Interstate Commerce Commission as reasonable from Pensacola, Florida, thereby transferring the fish business to Mobile which before had been competitive between Pensacola and Mobile.

(c) The case of *Meredith et al. v. St. Louis Southwestern Ry. Co.,* now pending before the Interstate Commerce Commission, wherein it is alleged that railway rates from Shreveport, La., into Texas should be reduced, in order that Shreveport may retain trade with Texas, of which it is alleged to have been deprived by orders of the Texas Commission made for the avowed purpose of building up trade centers in Texas.

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(d) A suit brought in the Circuit Court of the United States for the Northern District of Georgia by the Southern Railway Company against the Railroad Commission of Georgia, wherein it was alleged that the Georgia Commission reduced local rates in Georgia below those which it had itself immediately before fixed as reasonable, because of the conclusion that Atlanta was unjustly discriminated against in respect of interstate rates over which the commission had no control; which was alleged to appear from the opinions and orders of the Georgia Railroad Commission dated respectively July 16, 1904, and September 16 of the same year.

(e) Section 10654 of Cobbey's Annotated Statutes of Nebraska, 1911, expressly authorizes the Commission of that State to regulate interstate commerce providing in part as follows:

> Nothing in the foregoing section should be construed to prevent said commission (Nebraska State Railway Commission) from having the power when deemed by it necessary, to prevent interstate rate wars and injury to the business of the citizens of this state * * * to temporarily alter, amend or suspend any existing freight rates, tariffs * * * in this state.

The deposition of Honorable Martin A. Knapp, then Chairman of the Interstate Commerce Commission, taken November 29, 1910, in the Nebraska Rate Case *(Chicago, Rock Island & Pacific Railway Company v. Nebraska State Railway Commission)* in the Circuit Court for the District of Nebraska is printed as an appendix. We take the liberty of submitting this to the court because it states geographical facts of which the court will take judicial notice. It shows

the intimate interdependence of state rates and interstate rates and how in various sections of the country changes in one compel changes in the other. Mr. Knapp, being asked in this deposition if the alteration of interstate rates and of the flow of commerce between the states resulting from changes in state rates was not merely an incidental effect, said: "I think the two things have the relation of cause and effect."

The closer one comes to a true appreciation of the problems of railway regulation the more apparent it becomes that a railway is a unit; that it can no more be divided by state lines than by county lines; that it is absurd and impossible to attempt its regulation in parcels; and that to do so is to attempt to compel it to serve, not two, but many masters, which no man can do.

Every view of the subject leads towards this conclusion as

(a) The interstate and local business are moved at the same time on the same rails, with the same employes and power, and largely in the same trains and cars. They are inextricably intermingled.

(b) The same right of way, station grounds, terminals, rails, bridges and stations are provided for both local and interstate traffic; and the proportion of each sort of business handled with this plant varies from year to year and from day to day. No division of the plant, no apportionment of it between interstate and local traffic can be made today which will hold tomorrow.

(c) Terminals, facilities and connections in one state pertain directly to and aid the carrier's whole business and are an element of value to the whole line

and to its business in other states. *Missouri K. & T. Ry. v. Love,* 177 Fed. Rep. 493, p. 496.

(d) The bonds and stocks issued are against the whole line and cannot be divided by states.

(e) Tariffs are and must be made with a view to all the traffic and should be fair, as between through and short haul business, as between short haul business on different sections of the railway, and as between different kinds of freight. No regulation of rates can be just which cannot take into view the whole field, for change of a rate in one state may and commonly must affect similar rates in other states and similar rates between states. This is shown more fully by Mr. Knapp's deposition.

(f) A large part, generally half, of railway expenses are for the common benefit of all kinds of traffic, passenger and freight, and interstate and local. Maintenance of the plant and equipment and the whole expense of superintendence, such as salaries of officers, operating and traffic employes, counsel, accountants and engineers, pertain to the whole business, and are incapable of any division except on some arbitrary basis. To divide as between passenger and freight business some arbitrary basis must be adopted for half the total operating expenses, and to divide between state and interstate an arbitrary basis must be adopted for all the expenses. Efforts have been made to divide expenses, first as between passenger and freight, next as between interstate and local traffic. But no basis can be found that is not open to objection. See *Missouri K. & T. Ry. Co. v. Love,* 177 Fed. Rep. 493, We cannot here go into details touching these difficulties. The Court must be impressed, after consider-

ing the confiscation branch of this case, that no basis of division can be adopted, which can be demonstrated beyond controversy to be the true one, or which will receive universal assent.

But we have not found it necessary for purposes of this case to contend for wresting from the states that power which heretofore they may have been supposed to possess, *reasonably* to regulate their local commerce; but only that their power has limitations, one of which is that they cannot fix local rates which necessarily and inevitably alter and destroy interstate rates or directly regulate the flow of interstate commerce. It would seem a sound limitation of state power, that it cannot be pressed so far as to justify the state in establishing within its borders materially lower rates than the interstate rates duly established under the national law upon similar traffic moved between states under the same conditions; because pressing state power to that extent inevitably and certainly destroys the interstate rates and all national control over them, and because such extension of state power is one to change the flow of commerce and build up the industries of each state by injuring and destroying similar ones in other states. Our contemion has been only that state power and action must give way to whatever extent is necessary to complete and efficient national control over the subjects committed to that control by the constitution, and to that extent familiar decisions and well settled doctrines of this Court long ago determined, that state power and action are superseded by and must yield to the power and action of the Nation.

Our contention would leave with the states full power over commerce "completely, exclusively and purely internal." It is not necessary here to deny their right reasonably to reduce domestic rates to any point above the line of direct interference with interstate rates and with the free flow of interstate commerce, the right to exercise their police power fully and to the extent of incidentally affecting interstate commerce and the right to prevent discriminations as between persons, places and different descriptions of traffic within their own borders. They would not have the right so to regulate such matters as to impede or destroy interstate commerce, or to obstruct or destroy the regulations and rates touching the same established under national authority.

The necessary effect of the state's contention is that because carriers, the bulk of whose business is interstate, also carry domestic commerce within a state (as Mr. Justice Harlan said 216 U. S. at p. 37 because they can do it better and more economically than domestic companies) the state, instead of Congress, is to control the whole; that state legislation shall supersede national legislation and that the main volume of the carriers' business, which is interstate, shall be oppressed for the benefit of the small fraction which is local.

CHARLES W. BUNN.

APPENDIX.

DEPOSITION OF HON. MARTIN A. KNAPP, Chairman Interstate Commerce Commission, on behalf of the complainant, before H. S. Milstead, Notary Public, D. C., pursuant to the attached stipulation of counsel.

WASHINGTON, D. C., November 29, 1910.
11 o'clock A. M.

Met pursuant to the foregoing stipulation and subpoena.

Present on behalf of the complainant, Mr. McHugh.

Present on behalf of the defendants, Mr. Thompson.

MARTIN A. KNAPP,

a witness on behalf of the complainant, was duly sworn and testified as follows:

By Mr. McHugh:

Q. You may state your name, please.

A. Martin A. Knapp.

Q. And your official position.

A. Member of and Chairman of the Interstate Commerce Commission.

Q. How long have you been a member of the Interstate Commerce Commission?

A. Since the latter part of February, 1891.

Q. Continuously?

A. Continuously; and Chairman since January, 1898.

Q. Of course you, by virtue of your continuous service as a member of the Commission, are familiar with transportation and transportation conditions in the United States?

A. In a general way, I think I am.

Q. I wish you would state whether, in the operation of the railroads, the changing of the rates for transportation between points within a State may, of necessity, affect either the movement of interstate commerce or compel a change in the rates to be charged for interstate commerce.

A. Yes, as a practical necessity.

Q. I wish you would give illustrations of it.

A. Well, it so happens, because of conditions existing from time to time, that in the development of our rate systems and adjustments, certain basic rates are, wholly or largely, between points in the same State. I have in mind that in the early days of railroad construction, the navigable inland waters were relatively much more important than they are now, and so were made the natural points or lines upon which rates break, as they say. I suppose in many instances the expense of bridging rivers compelled, for the time being, a line to stop on one bank, and it frequently happened that another company built from the opposite bank. So that, for example, the Mississippi River has long been a basing point or point on which rates break, the rates generally from the eastern territory to the western territory being made by combinations or proportionals on the Mississippi River. The Ohio River is a similar breaking point in rates.

Now, as additional lines were constructed, the competition between them having its basis largely in commercial competition, led to a rate adjustment in, say, the territory between the Mississippi and Missouri rivers, by which each line made the same rates as every other line to all principal points; so that the rate to

Kansas City from Atlantic seaboard territory, whether by way of St. Louis and lines lying wholly or partly in the State of Missouri, or by way of Chicago and the various upper Mississippi River crossings, would all be the same.

The basis of that adjustment is the local rate, so to speak, between the Mississippi and the Missouri rivers, which, on first-class, is today, and has been for a long time, sixty cents per hundred pounds.

A point on the west bank of the Mississippi River, and another on the east bank of the Missouri River, are both in the State of Iowa. A reduction in that rate would, as a commercial necessity, I think, practically force a reduction in all the interstate rates which fall within the class I have outlined.

Q. That reduction would not only affect the rates between Mississippi River points and Missouri River points where the transportation was interstate, as, for instance, from St. Louis to Omaha, but also the aggregate of the through transportation from the seaboard?

A. Oh, yes. I do not mean to confine my statement to the movement which terminates on the Missouri River. It would affect that which goes to the trans-Missouri territory.

Q. There are other instances that might be given of a similar situation in the country?

A. Yes. That perhaps is as suggestive an illustration as any that can be given, because of the location of the territory and the relation of that territory to the great commercial movements of the country; but in eastern territory, for example, the New York Central line lies wholly in the State of New York from

Buffalo to New York City. Every other line is an interstate line. The volume of traffic, both east and west-bound, through the Great Lakes as well as all-rail, reaching or passing through Buffalo, is very great. Manifestly, a reduction by the authorities of the State of New York of the rate of the New York Central between Buffalo and New York would force all the interstate lines to make a corresponding reduction or abstain from the competitive business.

Let me give you two other illustrations which occur to me.

Take the movement of cotton, which is a very large traffic and a traffic so desirable that of course it has been an object of great desire on the part of the railroads which reach from the different parts of the cotton growing section to the seaports and the northern as well as the southern mills.

As the result of railroad construction and development, and the operation of a great variety of commercial forces, it has come about that there has been now for some years a relative adjustment of cotton rates which appears to be very fair and equitable. I recall that in a case which attracted some attention and gave the Commission some trouble, when the so-called Round Bale case was before us, where an effort was made to secure a lower rate based upon a form of baling which would permit heavier loading, that the general adjustment of cotton rates was pretty thoroughly developed, and there appeared to be no criticism of that adjustment. That is to say, the rates from Atlanta, as one cotton center, whether to Savannah for export or for the northern mills by coastwise lines, from Memphis, either south by the lines to

New Orleans, or northerly, towards New England and the North Atlantic seaports, the rates from Texas and Oklahoma, whether to the Gulf or northerly through the St. Louis and Cairo gateways to the same destinations, all appeared to be so well balanced, as compared to each other, that, as I recall it, there was no criticism of the general rate adjustment.

Now, the line from Atlanta to Savannah is all in the State of Georgia. Any material reduction in the cotton rate from Atlanta to Savannah, unless that was counterbalanced by an increase in the ocean or coastwise rate from Savannah would, as it seems to me, compel a corresponding readjustment of practically all the important cotton rates of the country.

Q. All the rates that you have mentioned?

A. Yes. It simply must have very large effect.

The other illustration I had in mind is of an entirely different character. Texas is a great country, an empire in extent, with a rapidly increasing population, where there is a very small amount of manufacturing and where all consumable supplies of merchandise and manufactured goods must come from outside, and largely from the north Atlantic seaboard and the middle west.

I may speak of two principal ways of reaching that territory. One is by ocean to Galveston and then by rail to all Texas territory. The other would be the all-rail route, presumably in the main through the St. Louis gateway.

Obviousy if the State of Texas makes a substantial reduction in rates on those classes of articles from Galveston to Texas territory, the all-rail lines must

meet that reduction or surrender a large part of the business to the ocean carriers.

Of course there are modifying influences. The question of time, safety, convenience, and many other things enter into it; but in a general way the reduction of the rate from Galveston to Texas territory would, it seems to me, as a commercial necessity, result in similar reductions by the all-rail lines.

I can add to that this observation, which is supported by official records. Something like a dozen or fourteen years ago the Interstate Commerce Commission investigated a complaint which was brought by St. Louis jobbing interests, alleging that the difference between car-load and less-than-car-load rates from St. Louis into Texas territory was too great, with the result that the jobbers in those classes of goods which move ordinarily in less-than-car-load lots was placed at a serious disadvantage. After we had held a session in St. Louis, we went to Texas, where we had sessions at two or three points, notably Austin, and I recall that Judge Regan, then a member of the Texas Railway Commission, appeared before us and virtually said if that difference were reduced by the Interstate Commerce Commission, the Texas Commission would take corresponding action with reference to the Texas distributing points, because it was the policy of that Commission to preserve Texas, so to speak, to the Texas jobber.

Q. And that meant to preserve the market to Galveston as a distributing point, largely?

A. Well, anyone who is familiar with the scheme of rates in Texas will realize just what that means, where they have a rate based on distance.

Q. Now, while you have covered the subject generally, and illustrations might be superfluous, I would like to call your attention to a local situation that is affected by the laws in controversy in this case. Omaha, Nebraska, is a grain market, Council Bluffs, in Iowa, across the river, is a grain market. So are Minneapolis, Memphis, Chicago, Kansas City, Galveston and New Orleans, competing for the grain of Nebraska. The lowering of the rates for the transportation of grain within Nebraska, from Nebraska points to Omaha, if no change is made in the interstate rates from Nebraska points to Council Bluffs, Chicago, and the other grain markets, will have what necessary effect on the movement of grain from Nebraska points?

A. Why, it would have the obvious tendency to increase the movement to Omaha.

Q. And in that way decrease the movement across the state lines to the other markets?

A. That was very strongly asserted, and made as convincing as any fact of that nature can be, I think, in various investigations which this Commission has conducted, particularly the one relating to elevator charges and allowances. Indeed, the original investigation, which challenged the legality, I may say, of the contract between the Union Pacific and the Peavey Company, was at the instance of competing railroads in that territory who took the position that that allowance must either be discontinued or reduced or they would be obliged to make a corresponding allowance at the Missouri River points which they reached.

Q. Below Nebraska?

A. Below Omaha.

Q. Such as St. Joseph and Kansas City?

A. Oh, yes; particularly those two places.

Q. So that a reduction in the local rate for the transportation of grain in Nebraska, from Nebraska points to Omaha, compels the interstate carriers of grain from Nebraska points to the other grain markets to choose between seeing their interstate commerce in grain limited or modifying their interstate rates on grain, in order to get it?

A. Yes, I think so.

Q. And that result flows as a necessary result of the enforcement of the law?

A. I think so. If I recollect right, in that investigation something of this sort appeared. You gentlemen who are more familiar than I am with the local geography will be able to correct me if I am in error; but as I recall it, it was stated that there is a line running very near the southern Nebraska line. Now, grain is a very sensitive article. It is not produced right on the railroad tracks. It has to be hauled by the farmer, and the farmer between two lines, which may be twenty or fifty miles apart, for that matter, or less, is going to draw his grain to the railroad where he can get the most money, taking into account the expense of hauling.

I only mention that to show that there was said to be an instance, as conceivably there might be an instance, where the pressure upon one railroad would be very great. It would lose the grain which was naturally tributary to its rails if it did not make the same rates to the common market that is made by another one wholly in an adjoining State, which is

equally accessible or nearly equally accessible to the farmer.

Q. Take one case, the St. Joseph & Grand Island Railroad, in Nebraska, running southeast from Nebraska points to St. Joseph, but not reaching Omaha?

A. Yes.

Q. The reduction of the rates on grain from Nebraska points would divert the shipments of grain from that railroad to the roads reaching Omaha, unless the St. Joseph road made a corresponding reduction on its line?

A. Well, instances are very numerous. I might add one from an entirely different section of the country, which was brought to our attention in some very important investigations which we have been conducting during the last year. The Puget Sound cities are in the State of Washington. East of them and just over the Cascades is a great and rapidly developing territory, very fertile and productive, already having a very considerable population. Those are wholly intra-state rates from Seattle and Tacoma into all Washington, practically as far east as the Idaho line.

Originally that entire territory was supplied from Portland, before the Puget Sound cities had any commercial importance. The lines of railway run from Portland up the Columbia River and other ways, reaching into that same territory. Now, manifestly, if the rates from Seattle and Tacoma to Spokane and Spokane territory are reduced by the State of Washington, the carriers from Portland, which are interstate carriers into that same territory, must make the corresponding reduction or go out of the business; and they cannot go out of the business, for two reasons:

First, because they need the revenue; and, second, because the town behind them wants to do business in that territory, and brings the pressure upon them and says, "We have got to sell goods up there, and we cannot unless you make the same rates."

So, as I answered, it was conceded on all hands in that particular case that the rates from Seattle, Tacoma and Portland into the whole of eastern Washington had to be practically the same.

Q. What has been said of grain applies to other products, such as livestock, but probably in not quite so sharp a degree. They are not so sensitive as grain?

A. Not quite.

Q. And in a measure can be regulated by service; but as a general proposition it applies to all traffic. That is generally true, is it not?

A. Yes; in varying degrees, from a commercial necessity which is irresistible to a commercial pressure which is utilized in all cases influentially.

Q. Now take the Union Pacific Railroad, which extends from Omaha west through Nebraska to the Western States. It has a station near the western boundary of Nebraska. Not many miles west of that in Wyoming is another station, both stations being points of shipment of grain and livestock commodities, the distance between them being a very few miles. If a fifteen per cent reduction is made for transportation on the Union Pacific Railroad to Omaha from its last western station in Nebraska, and no reduction is made for like transportation from the other station a few miles away west, across the state line, there will be, as a result, will there not, a discrimination as between those localities in the matter of rates?

A. Obviously so. Some instances of that kind have been brought to our attention in connection with interstate rates, where the State rate was fixed by a public authority and generally with reference to distance, so that it increased progressively. The moment the State line was crossed, up went the rate.

Q. Take another illustration. Take a railroad running from Nebraska points to Omaha and to Council Bluffs. If that railroad is forced to make a reduction in its rates of transportation from points in Nebraska to Omaha, and makes no corresponding reduction in its rates to Council Bluffs from those stations, a discrimination is then practiced by that railroad between stations?

A. That is obvious.

Q. And that would likewise be true of a railroad running to Omaha and St. Joseph from points in Nebraska?

A. Yes; St. Louis and East St. Louis are another illustration. There you have two important towns on opposite sides of the river, which is the boundary line between States.

CROSS-EXAMINATION.

By Mr. Thompson:

Q. Mr. Knapp, in your official capacity as a member of the Interstate Commerce Commission, in considering and determining the question of the reasonableness or unreasonableness of interstate rates, do you take into consideration the State rates?

A. Yes.

Q. For what purpose?

A. Well, I suppose no one can tell how much his judgment in a particular case is influenced by one fact rather than another. So I could not say to what extent; but, naturally, when the reasonableness or discriminatory character of any interstate rate is alleged, the States rates in that section are brought to our attention. We have knowledge of the fact. What impression it may produce upon my mind, I could not state myself.

Q. Well, have you any particular purpose in considering the question of the State rates?

A. We have the purpose of considering or trying to consider every fact which is entitled to be taken into account, if that is what you mean.

Q. If I understood your testimony correctly, you state that there are certain, what perhaps might be termed natural basic points for interstate rates?

A. They were of that character originally, for the reason I named. They have continued to be recognized as such in rate-making.

Q. Now, what would you say, from the experience you have had in matters of this kind in investigating these questions, as to why certain points were natural basic points for the making of rates?

A. Well, using the term literally, I think a navigable river would be the natural point.

Q. In other words, water competition?

A. It is not so much a question of competition, in my judgment, Mr. Thompson. The Mississippi and Missouri rivers both flow to the south. The important traffic movement is east and west. But they were building railroads out into that country. It was sparsely settled. Those were adventures which involved risk.

They built as cheaply as they could. It is very expensive to bridge a river. Therefore it seems perfectly natural that a road projected in that territory should be projected, say, to the Mississippi River. and stop there, and that another road then might be started from the other side and go on to the Missouri River or to the interior, and the connection between them for a long time, perhaps, would be effected by water transfer, ferry, or something of that sort.

Q. Then original considerations at that time for making these points the basic points have been recognized and adhered to up to the present time, have they?

A. They have been very largely continued.

Q. In considering the reasonableness of an interstate rate between Chicago and the Mississippi River, what do you take into consideration?

A. Oh, a great many elements—a comparison of rates, of the volume of tonnage, of the costs of operation, and of the financial results of operations, among other things.

Q. Then in considering the reasonableness of a rate between Chicago and the Missouri River, are there any additional elements?

A. Substantially, the same considerations.

Q. Do you take into consideration or lay much stress on the fact of the existence of local rates in determining the reasonableness of a rate between Omaha and Chicago?

A. Why, in this sense, that ordinarily one would think that as distance increases over which any given traffic moves, the rate per ton per mile should diminish, and therefore ordinarily the through rate should be

less—certainly not more, ordinarily less—than the combination of locals.

Q. That is for the purpose of spreading the terminal cost, is it not?

A. Oh, yes; and because traffic could not move at rates actually proportioned to distance. And let me say, in that connection, Mr. Thompson, I do not want my testimony here to give the impression that this Commission either ignores or has an attitude of question towards State-made rates. On the contrary, a rate which is imposed by public authority is entitled to be seriously regarded. We have repeatedly held that a through rate should not exceed the combination of locals voluntarily established by the carrier. That seems a self-evident proposition. While I do not recall that the Commission has ever said so in terms, Mr. Thompson, I think it has, in effect, taken the position that there is a presumption against the reasonableness of a through rate when it exceeds the combination of locals, although one or more of those locals may be rates fixed by State authority against the will of the carrier; but perhaps the presumption would yield more readily in the latter case than in the former.

Q. Now take livestock and grain, when shipped in carload lots from a point in Nebraska to Chicago. Do you know what the interstate rate is based on or made up of, whether or not it is made up of the sum of the locals?

A. I do not know.

Q. This effect that you speak of, the lowering of State rates having upon the flow of commerce between the States is an incidental effect, is it not?

A. I think it is more than an incidental effect, Mr. Thompson. I think the two things have the relation of cause and effect.

Q. Your idea is that it has the direct effect of interfering with the flow of commerce?

A. Yes, the direct effect.

Q. Is it your opinion from the experience you have had, that a reduction of fifteen per cent on grain when shipped in carload lots, or on building material or livestock, entirely within the State of Nebraska, would have the effect to interfere with the flow of interstate commerce?

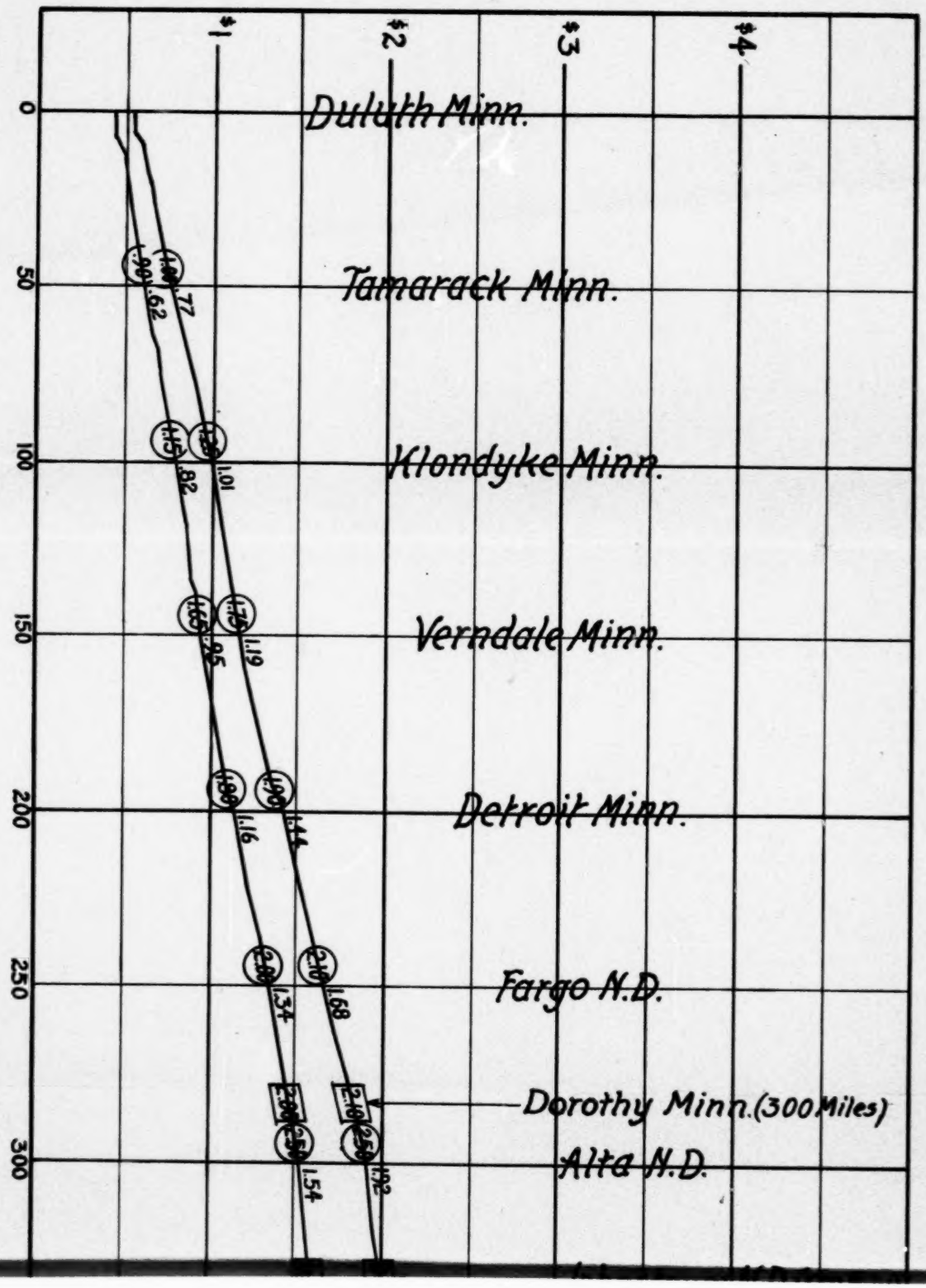
A. Yes; in this sense. I do not mean to say that it would impede the flow. I mean to say it would, as a practical commercial consequence, lead to a corresponding reduction in related interstate rates. That has been the universal experience, and I do not see how any other result could be expected.

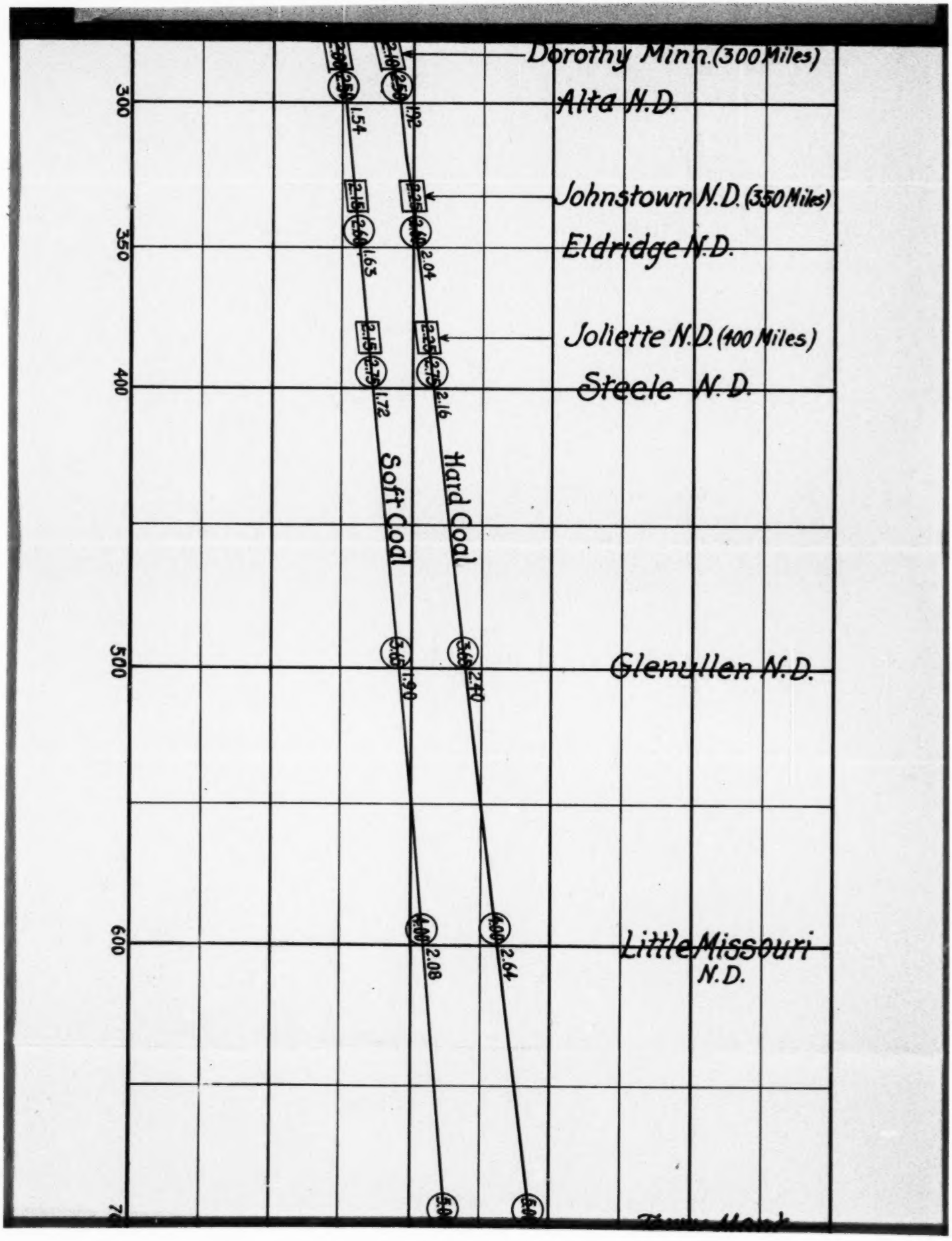
Q. That might result in depriving the State of its right to control its domestic commerce, might it not, if that was carried to its logical conclusion?

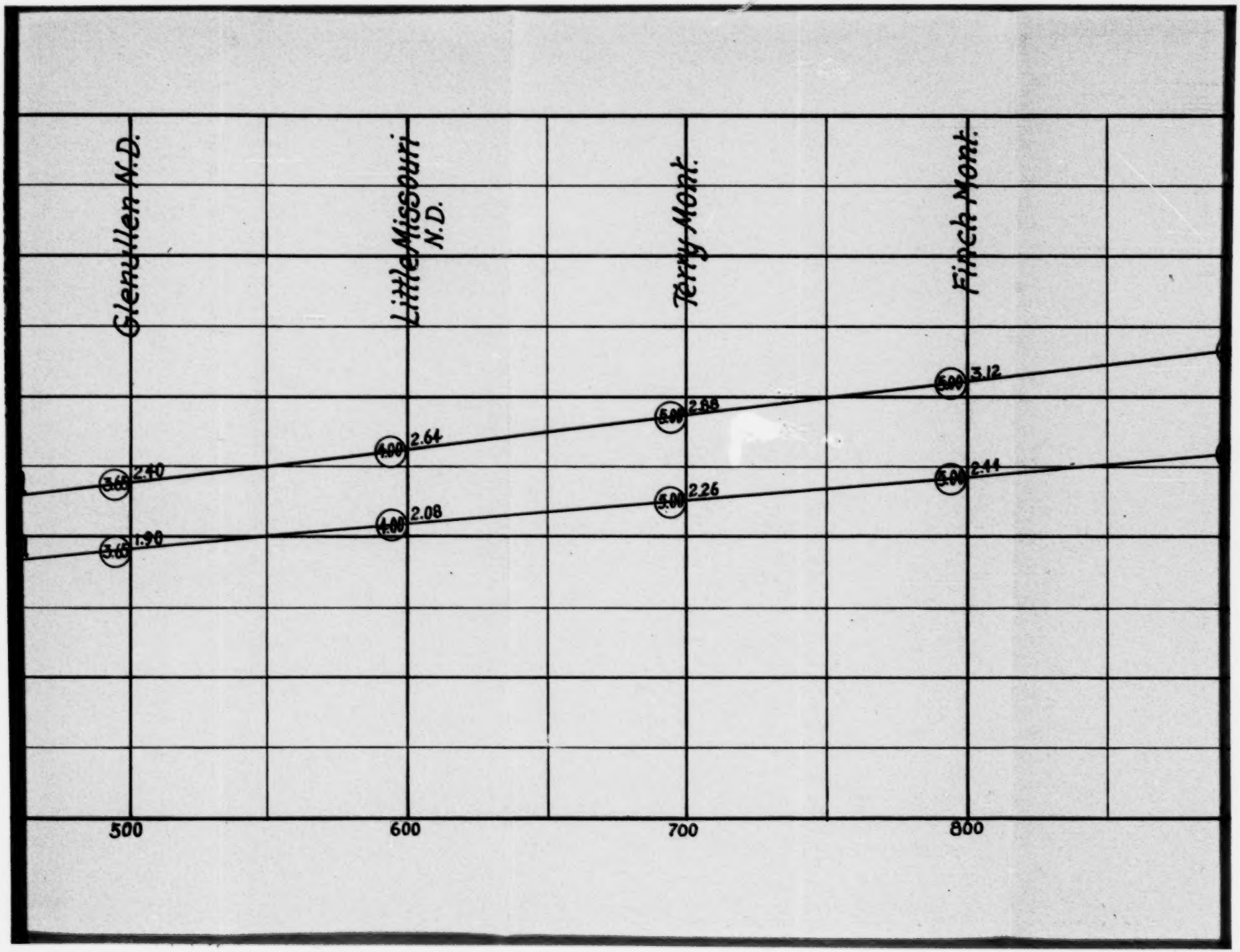
A. That depends on what the right of the State is to control its commerce.

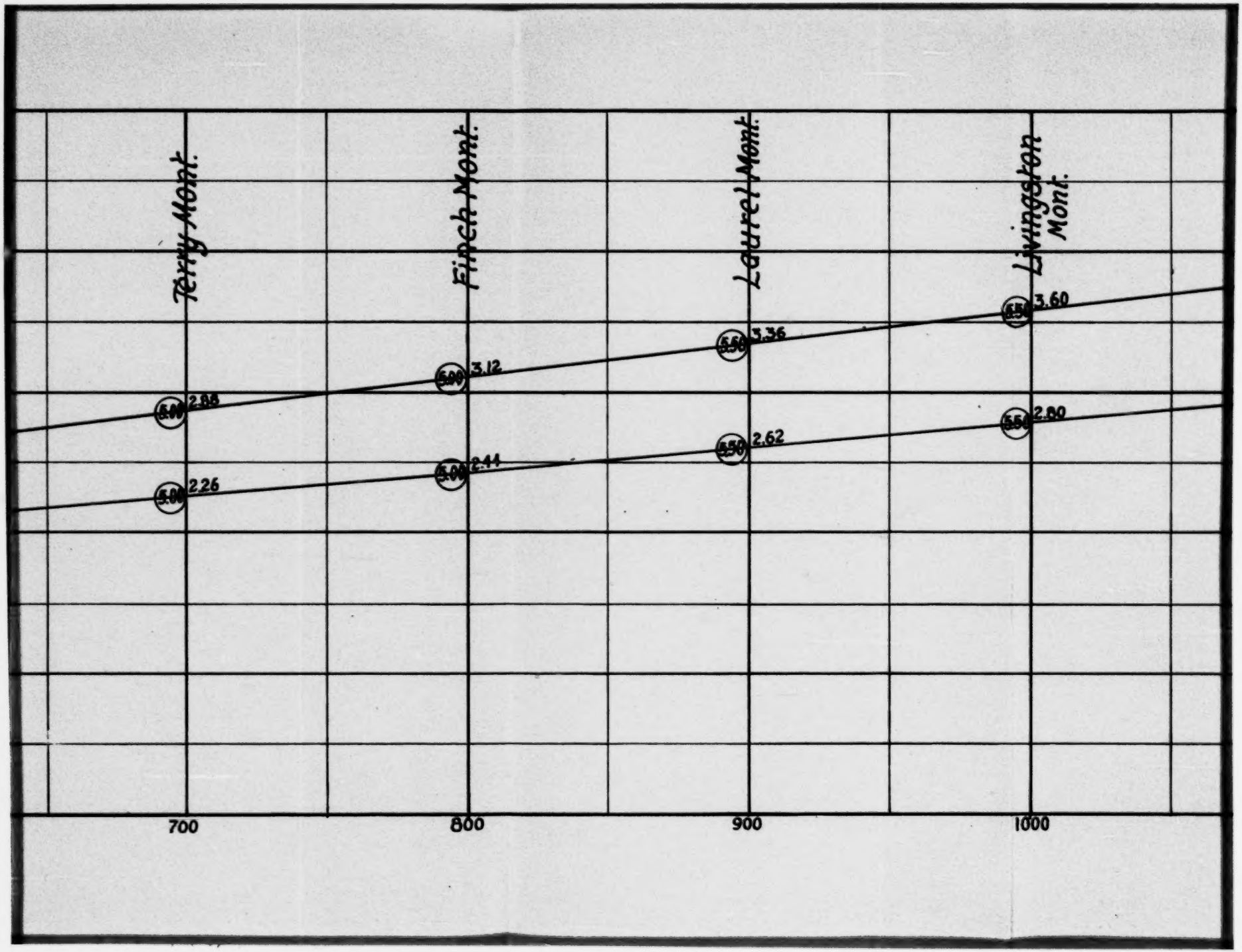
CHARTS

TOO LARGE FOR FILMING

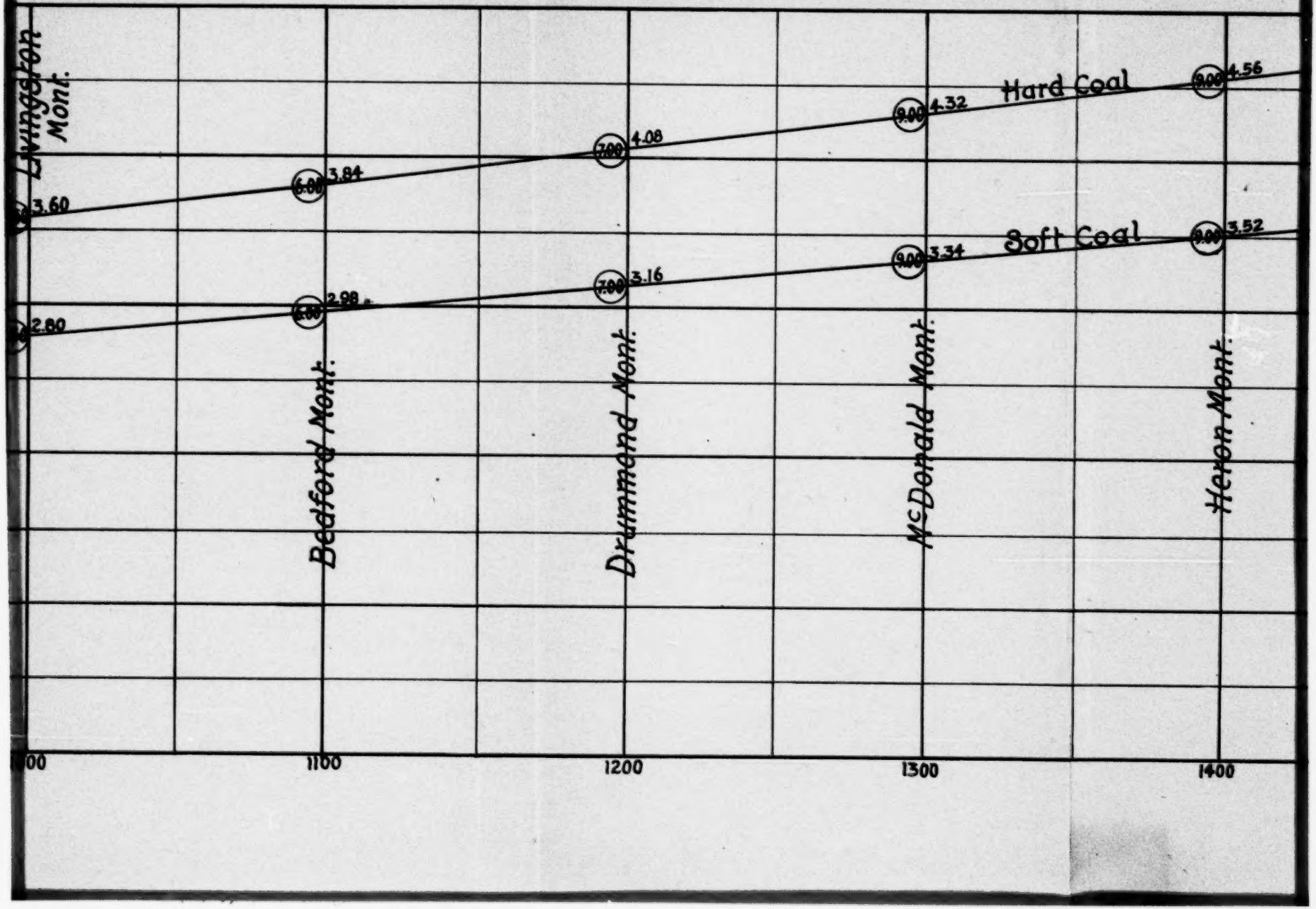

$1
$2
$3
$4
0
50
100
150
200
250
300
Duluth Minn.
Tamarack Minn.
Klondyke Minn.
Verndale Minn.
Detroit Minn.
Fargo N.D.
Dorothy Minn. (300 Miles)
Alta N.D.
1.01
1.19
1.44
1.68
1.92
1.54
1.34
1.16
.95
.82
.77
.62


Dorothy Minn. (300 Miles)
Alta N.D.
Johnstown N.D. (350 Miles)
Eldridge N.D.
Joliette N.D. (400 Miles)
Steele N.D.
Glenullen N.D.
Little Missouri N.D.
Soft Coal
Hard Coal
300
350
400
500
600
1.54
1.92
1.63
2.04
1.72
2.16
1.90
2.40
2.08
2.64


Glenullen N.D.
Little Missouri N.D.
Terry Mont.
Finch Mont.
3.12
2.88
2.64
2.40
2.44
2.26
2.08
1.90
500
600
700
800

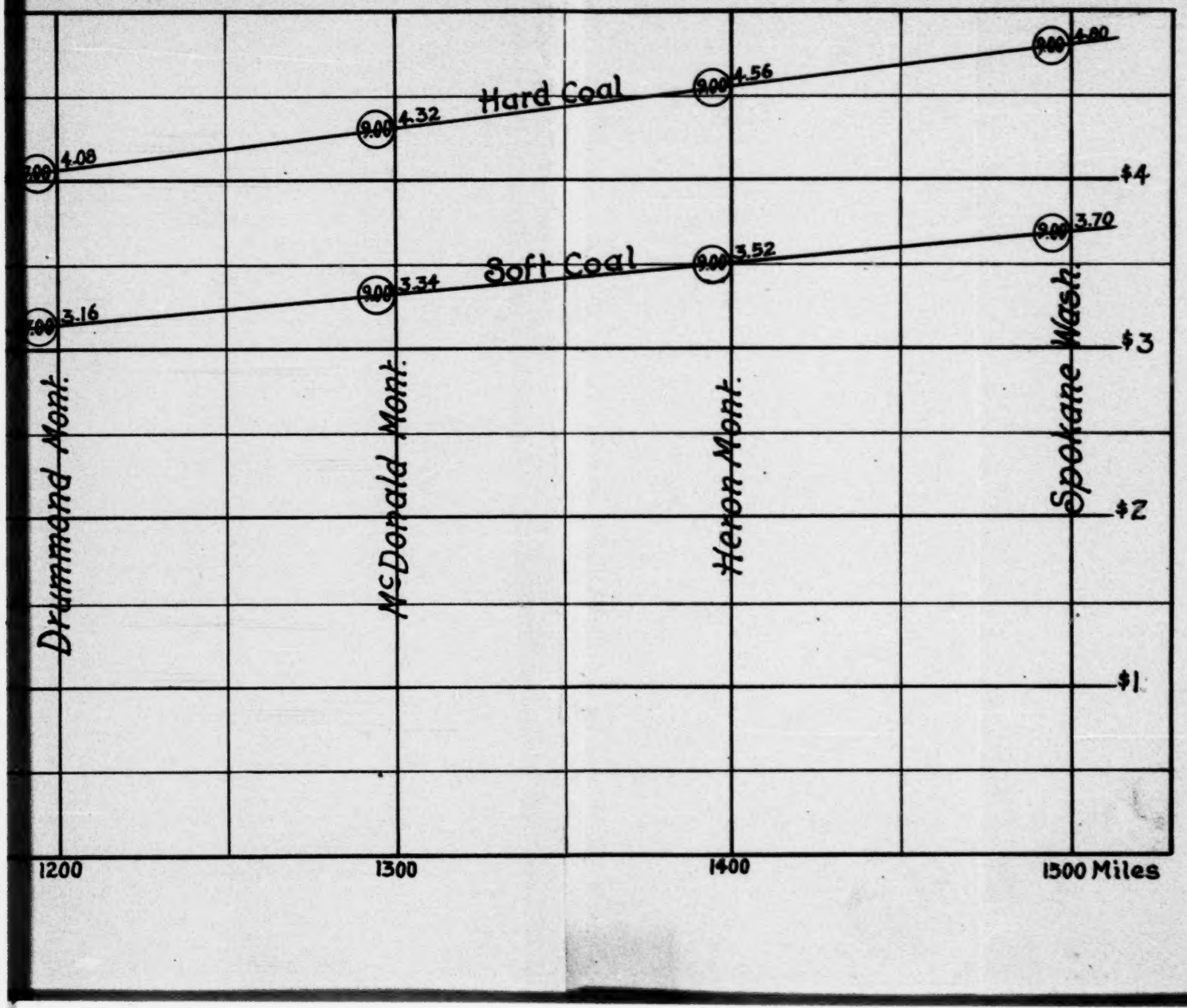

Terry Mont.
Fitch Mont.
Laurel Mont.
Livingston Mont.
5.00 2.88
5.00 3.12
5.50 3.36
5.50 3.60
5.00 2.26
5.00 2.44
5.50 2.62
5.50 2.80
700
800
900
1000

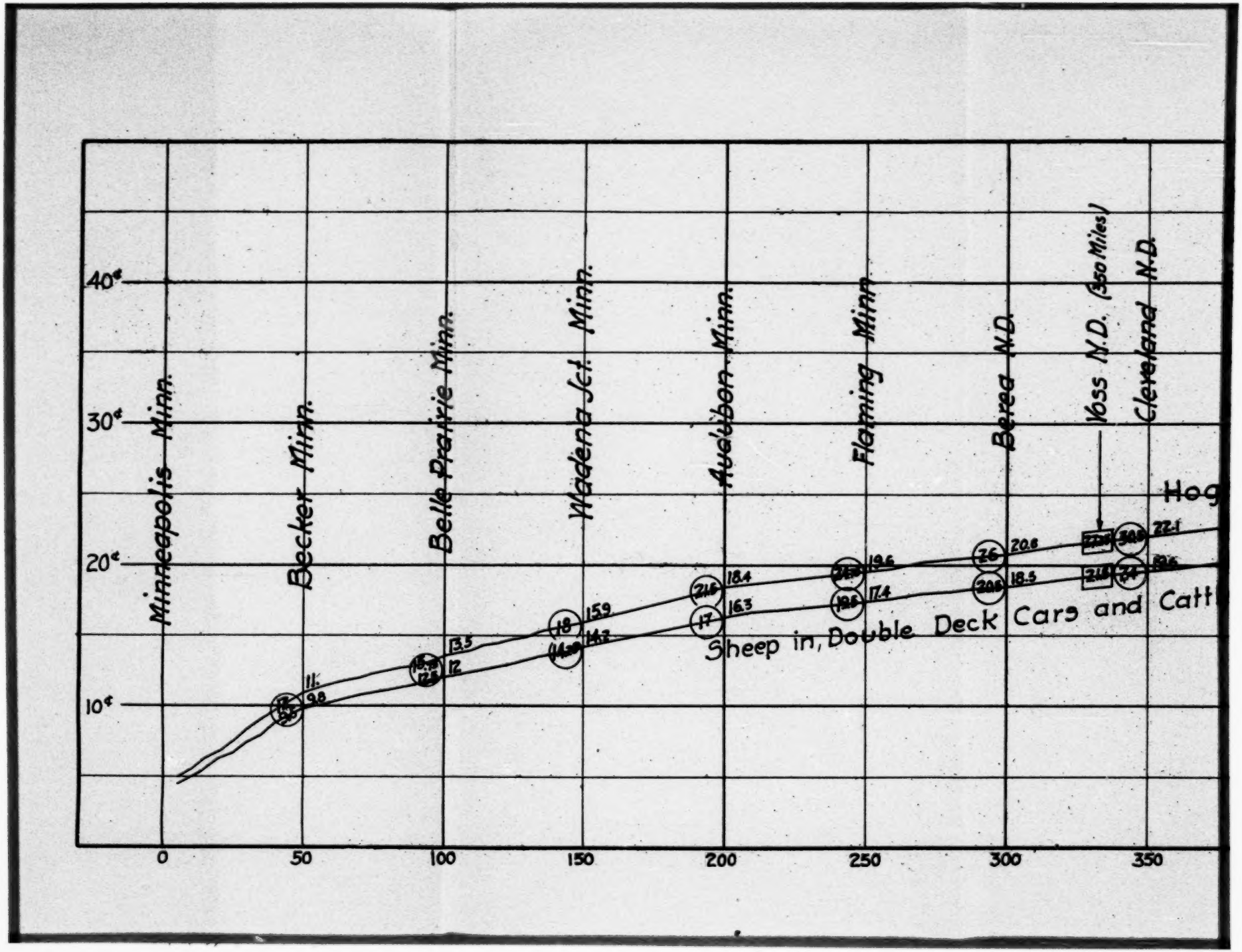
Note: Encircled figures Rates in effect June 1st 1907.
Other figures Proposed Minnesota Rates and extension thereof to 1500 Miles.
Rates are in Dollars and Cents per ton of 2000 lbs.



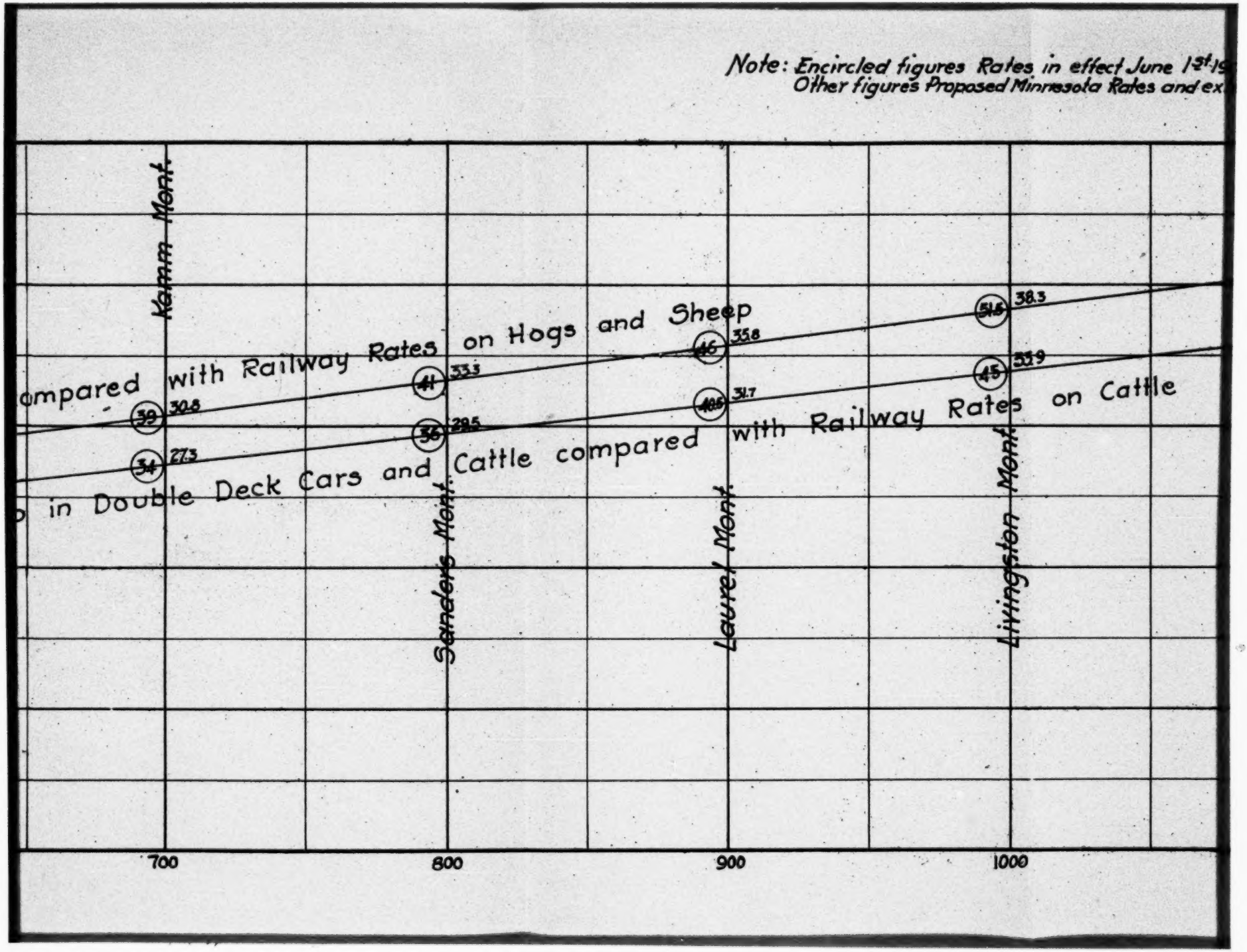
Plat B

Rates in effect June 1st 1907.
sed Minnesota Rates and extension thereof to 1500 Miles.
and Cents per ton of 2000 lbs.



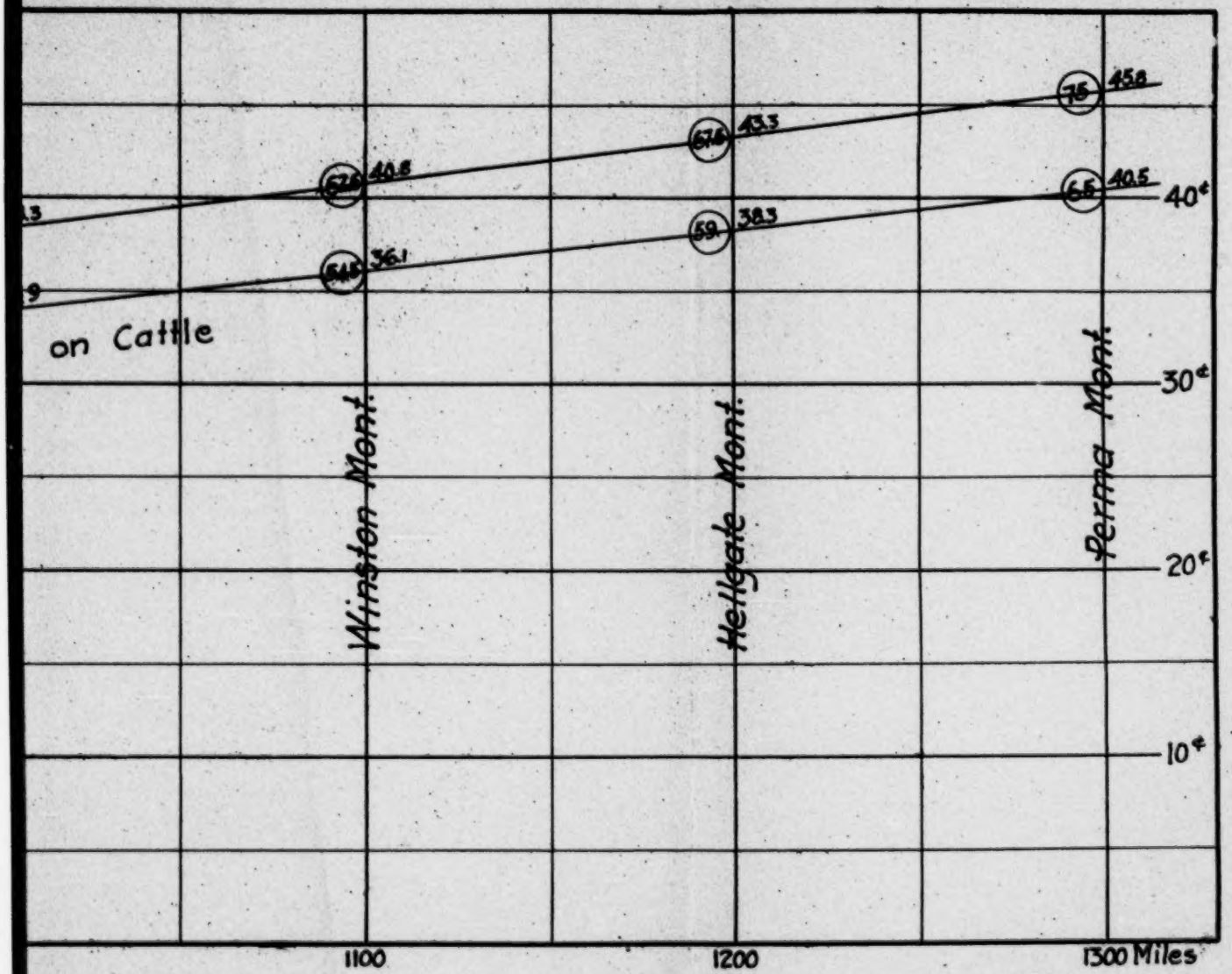

40¢
30¢
20¢
10¢
0
50
100
150
200
250
300
350
Minneapolis Minn.
Becker Minn.
Belle Prairie Minn.
Wadena Jct. Minn.
Audubon Minn.
Fleming Minn.
Berea N.D.
Voss N.D. (350 Miles)
Cleveland N.D.
Hog
Sheep in, Double Deck Cars and Catt
11.
9.8
13.5
12.
15.9
14.2
18.4
16.3
19.6
17.4
20.8
18.5
22.1
19.6

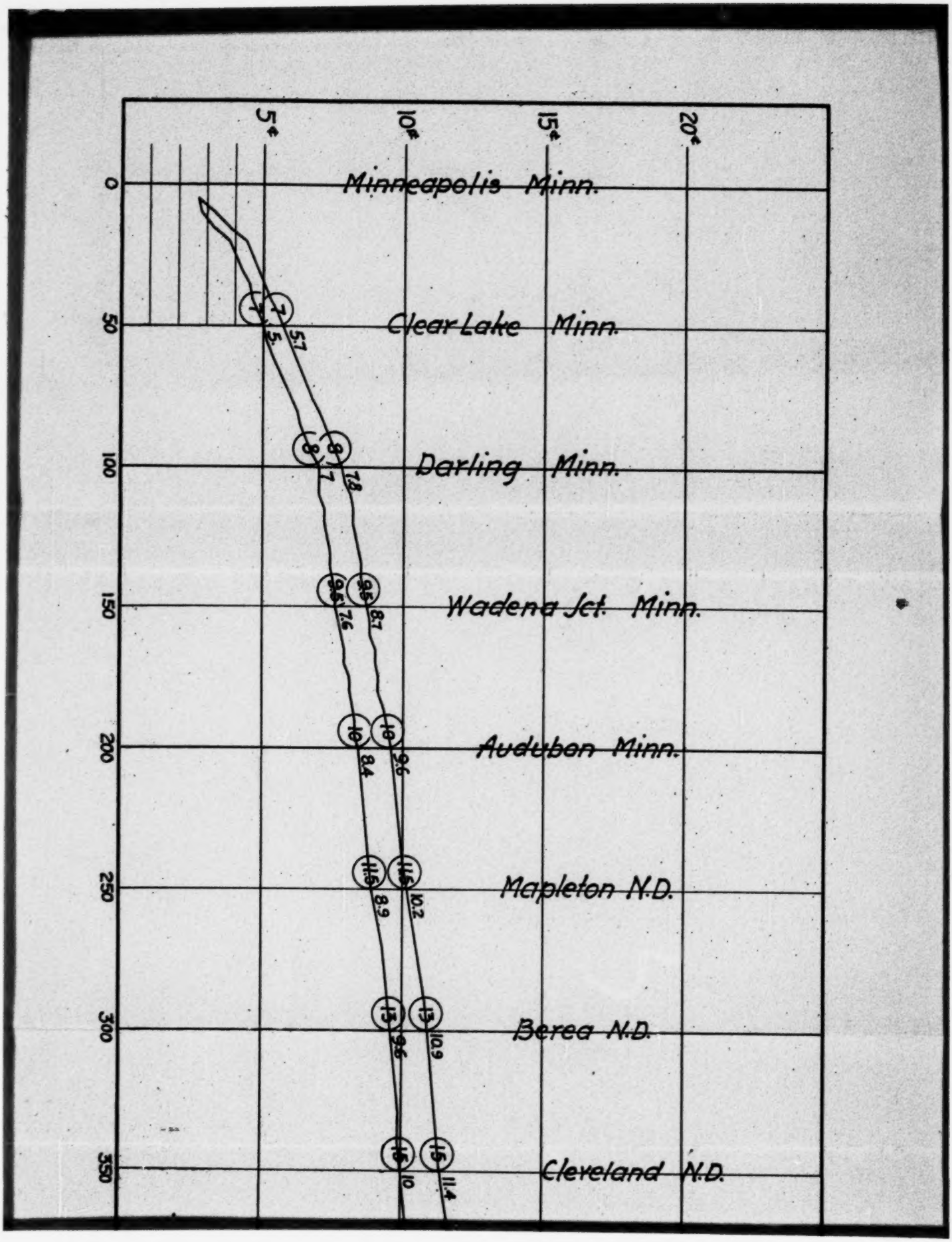
Bowesmont N.D.
Voss N.D. (350 Miles)
Cleveland N.D.
Pembina N.D. (400 Miles)
Driscoll N.D.
Missouri River
Eagles Nest N.D.
DeMores N.D.
Kamm Mont.
Legislative Rates on Hogs compared wit
Hogs
Legislative Rates on Sheep in Double
Legislative
ck Cars and Cattle
20.8
18.5
22.1
23.3
20.7
25.8
22.9
28.3
25.1
30.8
27.3
300
350
400
500
600
700

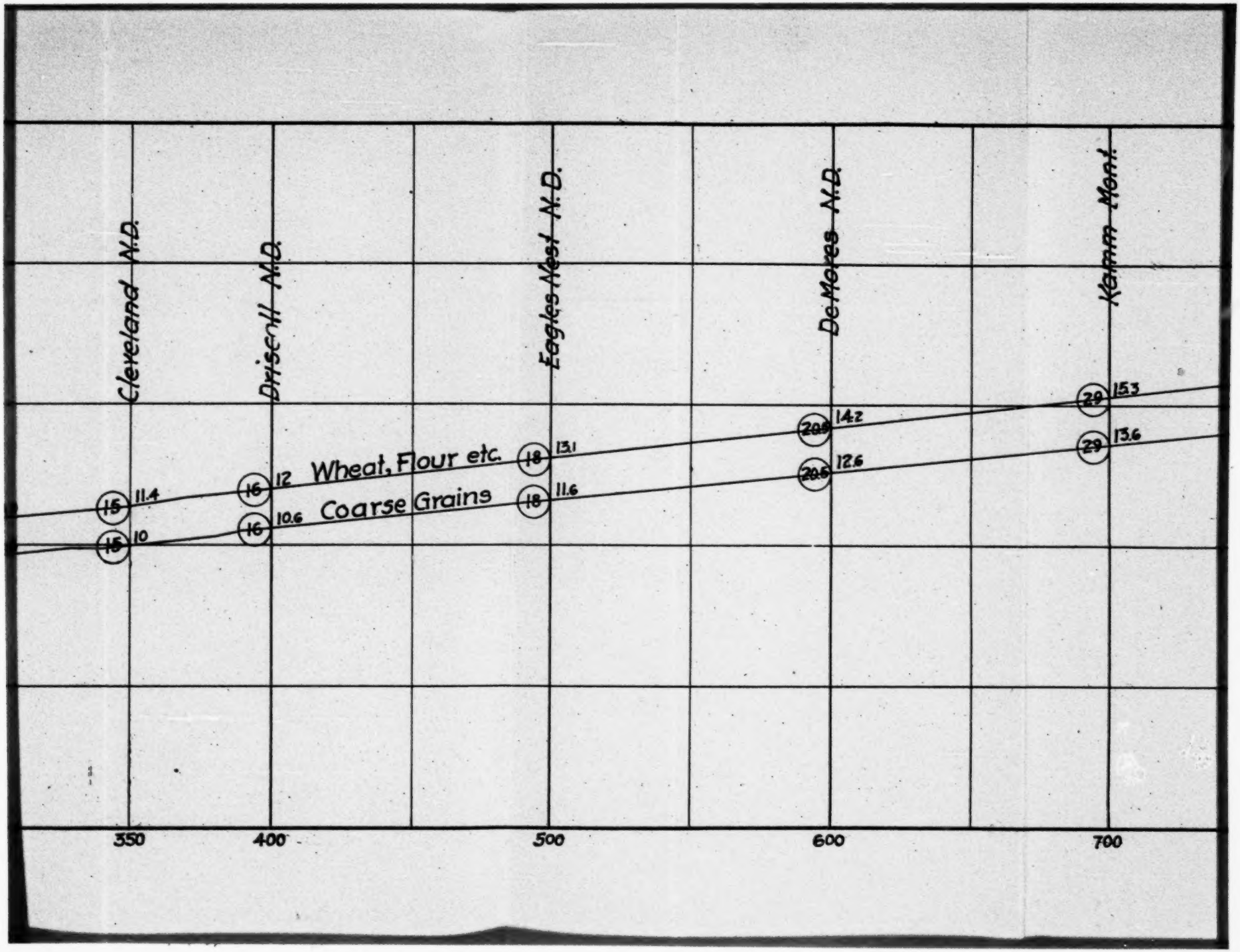

Note: Encircled figures Rates in effect June 1st 19
Other figures Proposed Minnesota Rates and ex
ompared with Railway Rates on Hogs and Sheep
o in Double Deck Cars and Cattle compared with Railway Rates on Cattle
Kamm Mont.
Sanders Mont.
Laurel Mont.
Livingston Mont.
700
800
900
1000
39
30.8
41
33.3
46
35.8
51.5
38.3
34
27.3
36
29.5
40.5
31.7
45
33.9

Plat C

in effect June 1st 1907.
nnesota Rates and extension thereof to 1300 Miles



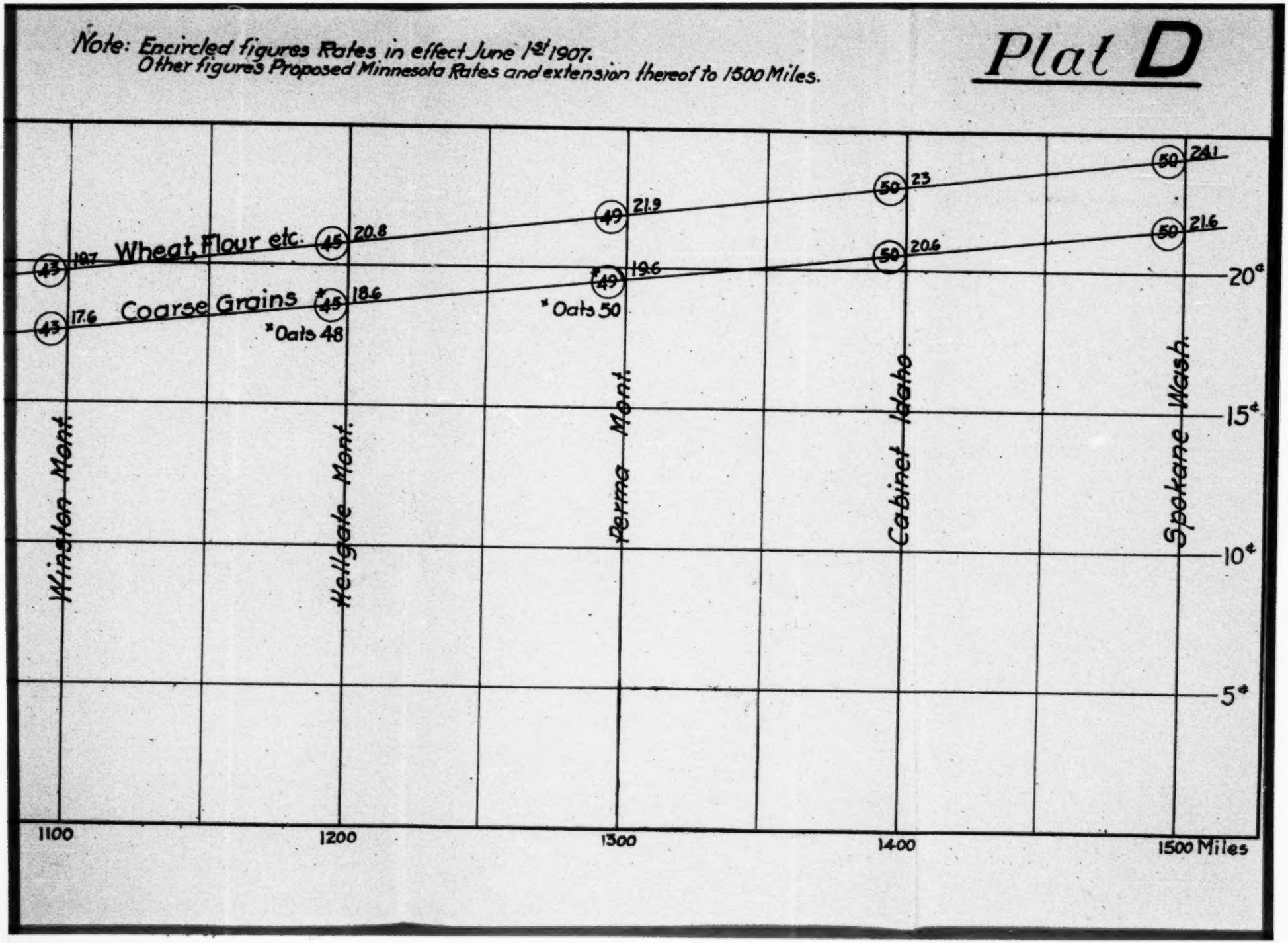

5¢
10¢
15¢
20¢
0
50
100
150
200
250
300
350
Minneapolis Minn.
Clear Lake Minn.
Darling Minn.
Wadena Jct. Minn.
Audubon Minn.
Mapleton N.D.
Berea N.D.
Cleveland N.D.
7
7
5.5
5.7
8
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7
7.8
9.6
9.6
7.6
8.7
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13
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9.6
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16
10
11.4

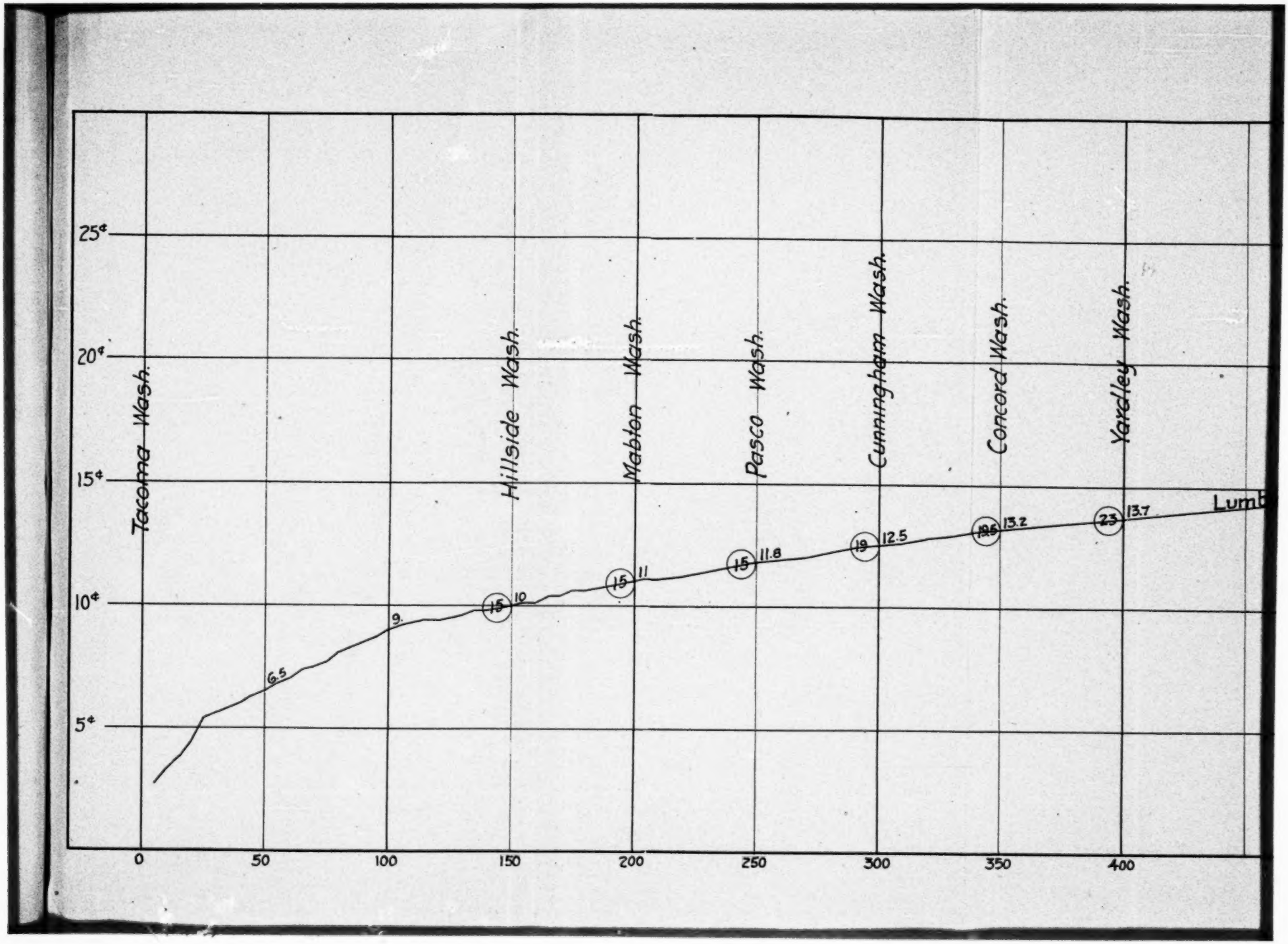

Cleveland N.D.
Driscoll N.D.
Eagles Nest N.D.
DeMores N.D.
Kamm Mont.
Wheat, Flour etc.
Coarse Grains
15 11.4
15 10
16 12
16 10.6
18 13.1
18 11.6
20.6 14.2
20.6 12.6
29 15.3
29 13.6
350
400
500
600
700

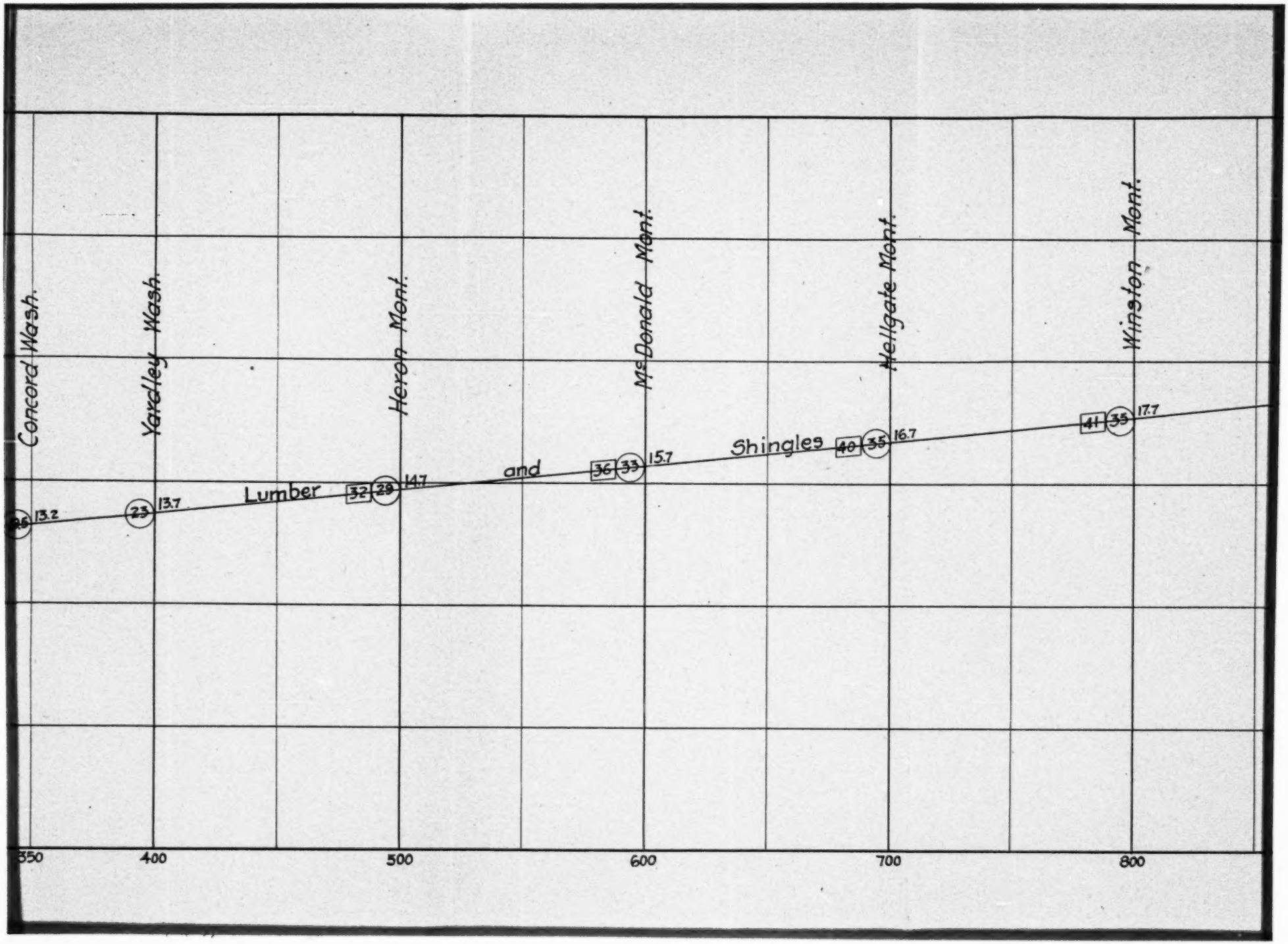
No
Kamm Mont.
Sanders Mont.
Laurel Mont.
Livingston Mont.
Represents Gallatin Valley
Wingston Mont.
700
800
900
1000
1050
1100
29
15.3
29
13.6
31
16.4
31
14.6
32
17.6
32
15.6
35
18.6
35
16.6
35
19.1
36
17.1
43
19.7
43
17.6

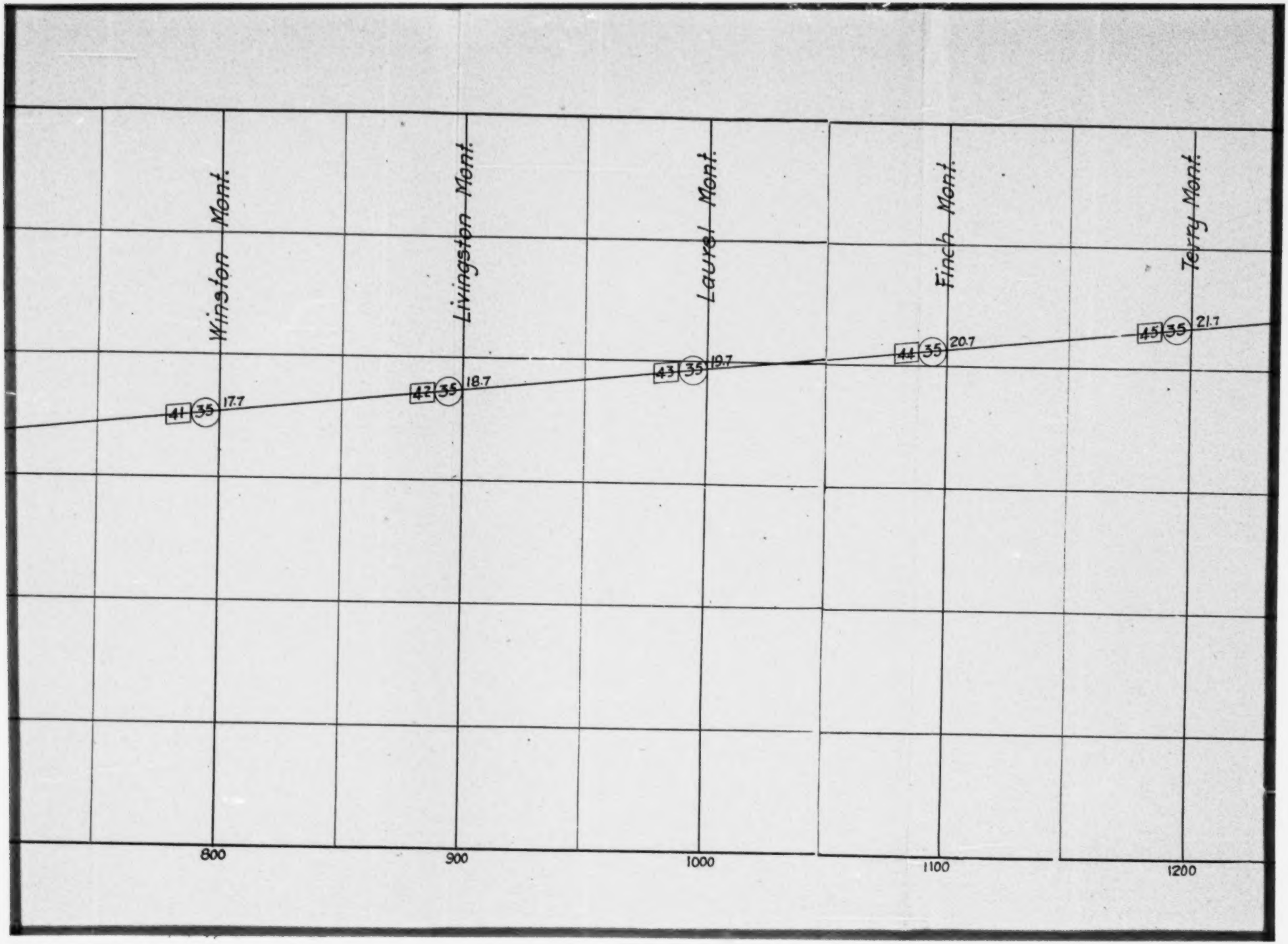
Note: Encircled figures Rates in effect June 1st 1907.
Other figures Proposed Minnesota Rates and extension thereof to 1500 Miles.

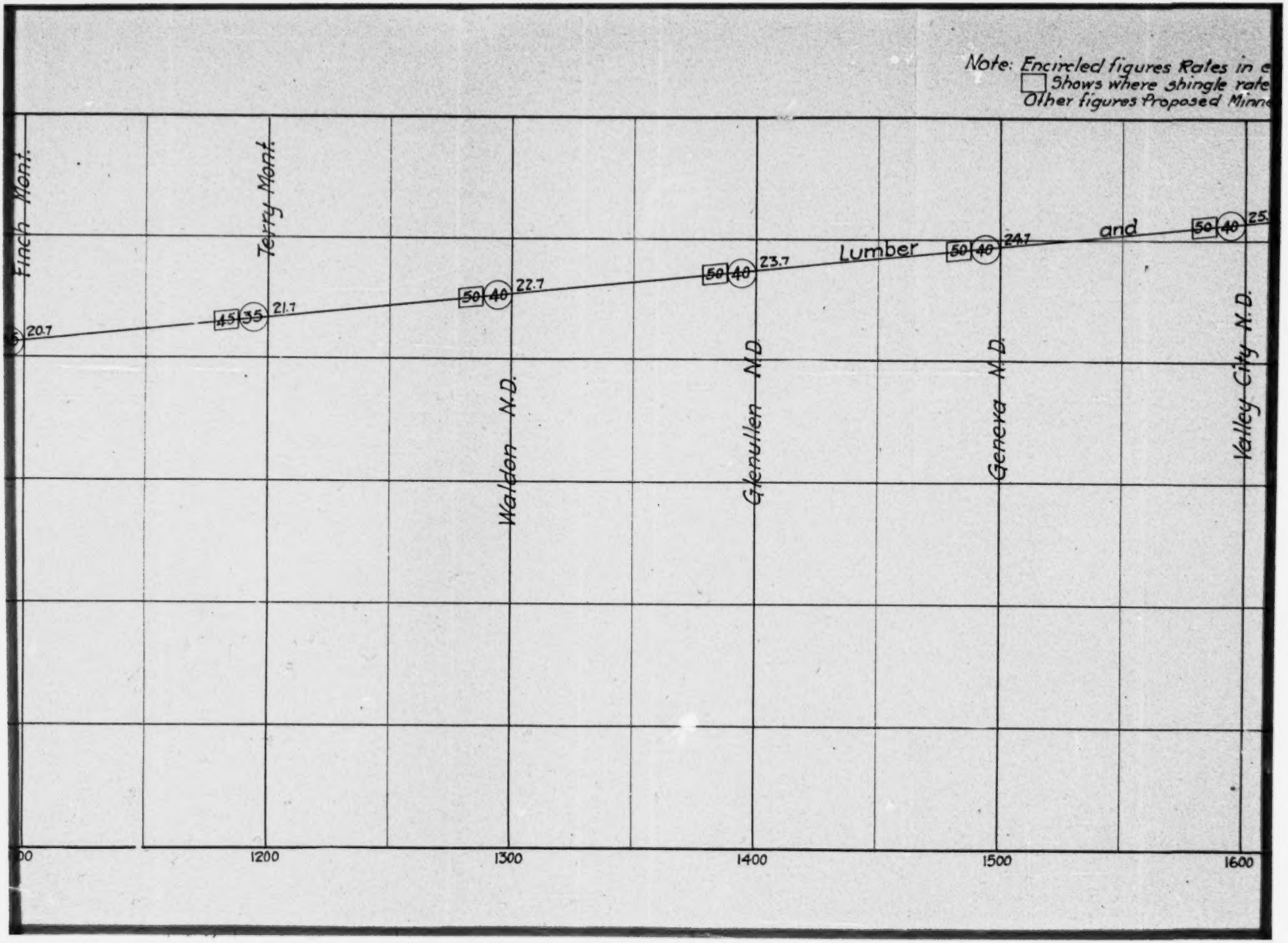
Plat D




25¢
20¢
15¢
10¢
5¢
Tacoma Wash.
Hillside Wash.
Mabton Wash.
Pasco Wash.
Cunningham Wash.
Concord Wash.
Yakdley Wash.
Lumb
6.5
9.
15
10
15
11
15
11.8
19
12.5
19.5
13.2
23
13.7
0
50
100
150
200
250
300
350
400

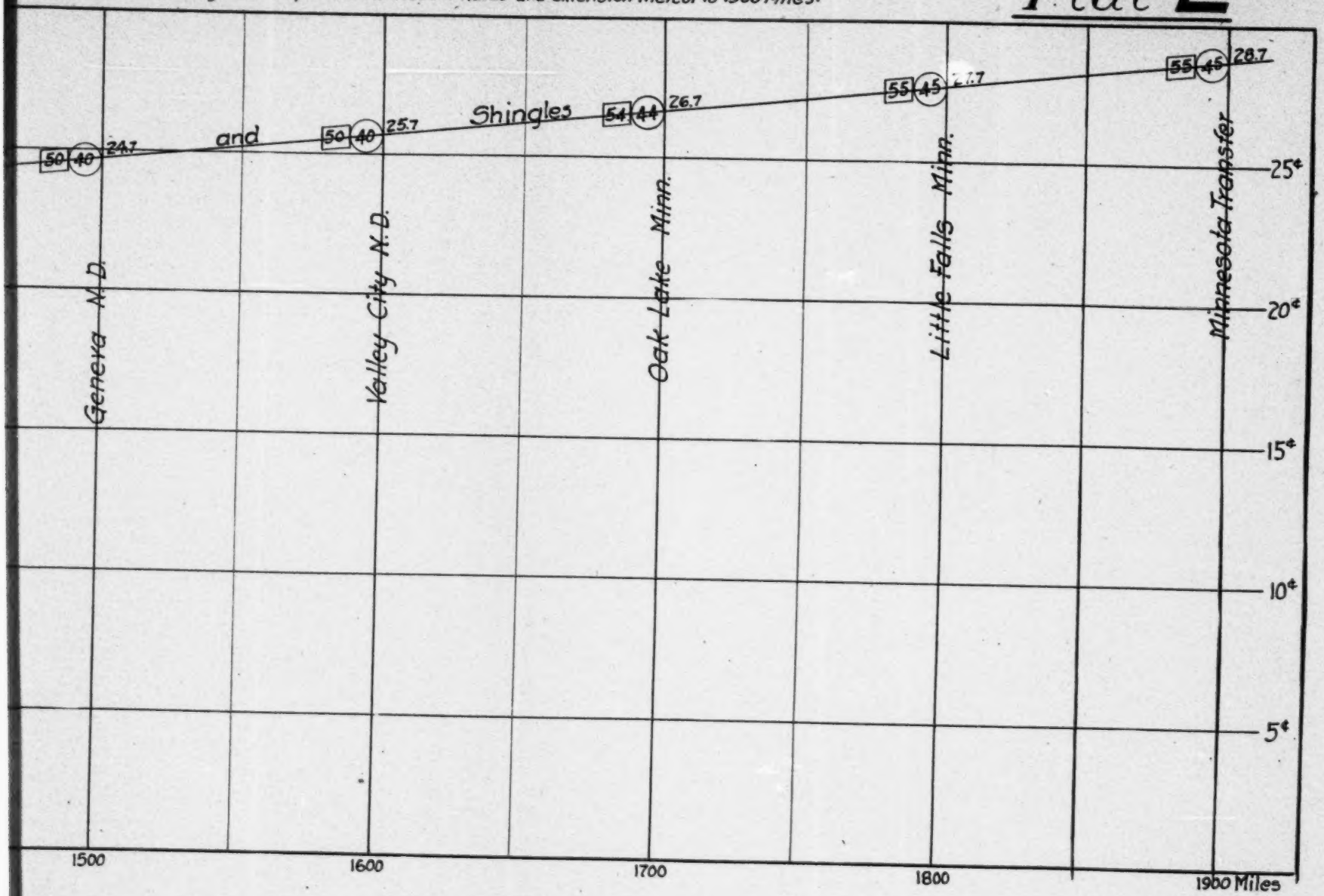

Concord Wash.
Yardley Wash.
Heron Mont.
McDonald Mont.
Hellgate Mont.
Winston Mont.
Lumber and Shingles
26 13.2
23 13.7
32 29 14.7
36 33 15.7
40 35 16.7
41 35 17.7
350
400
500
600
700
800

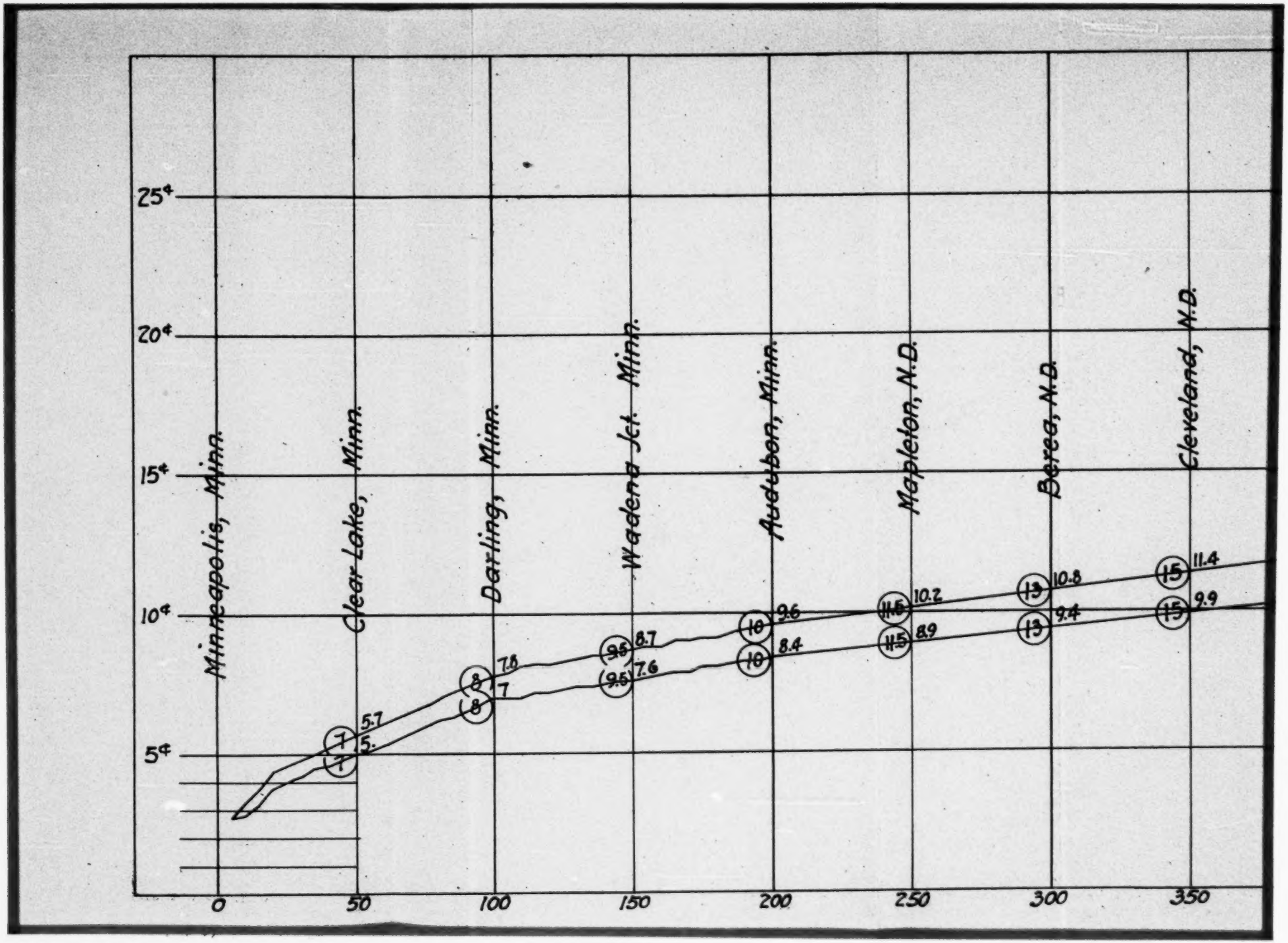

Winston Mont.
Livingston Mont.
Laura Mont.
Finch Mont.
Terry Mont.
41 35 17.7
42 35 18.7
43 35 19.7
44 35 20.7
45 35 21.7
800
900
1000
1100
1200

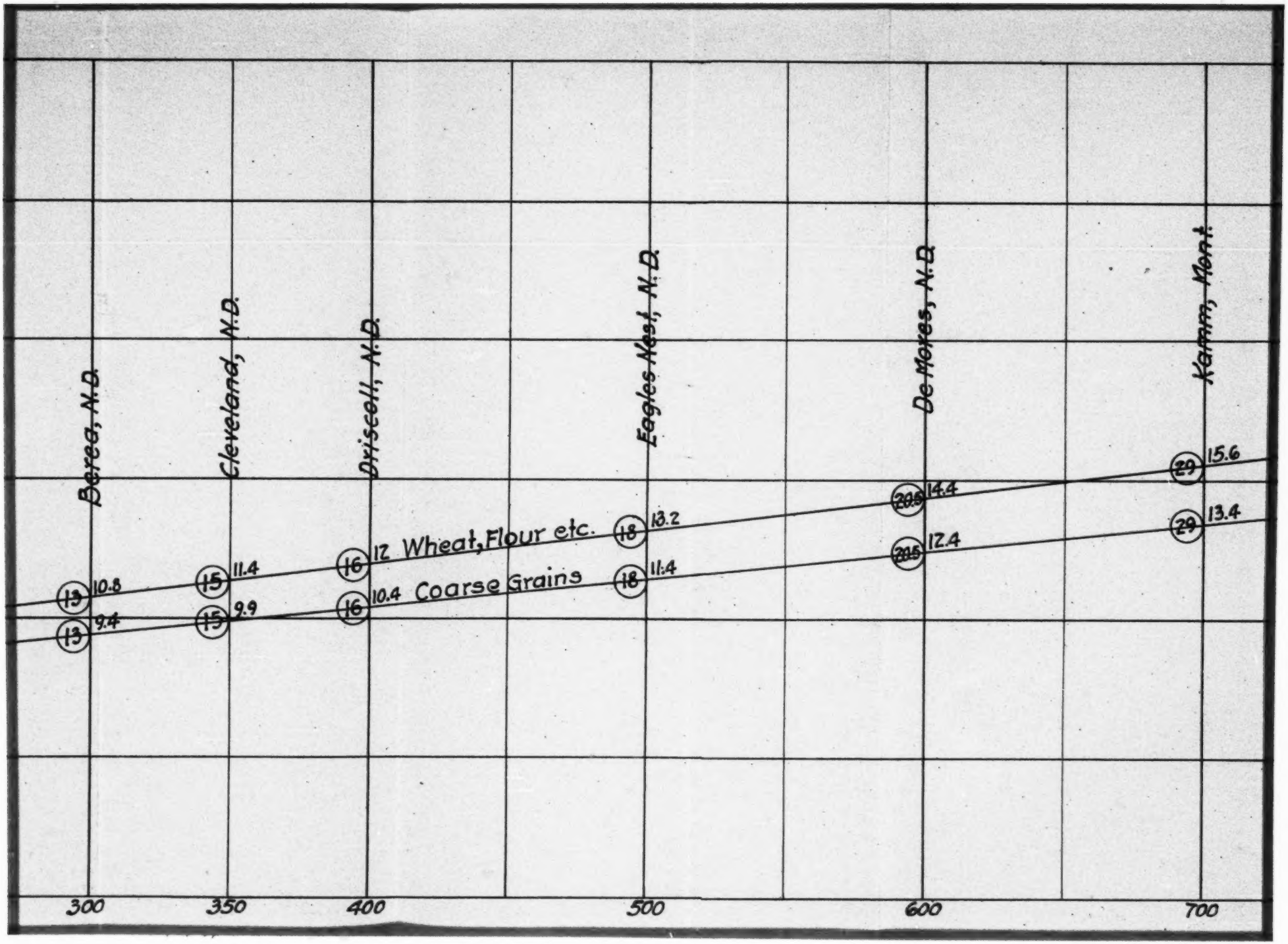

Note: Encircled figures Rates in c
Shows where shingle rate
Other figures Proposed Minn
Finch Mont.
Terry Mont.
Walden N.D.
Glenullen N.D
Geneva N.D.
Valley City N.D.
20.7
45 35 21.7
50 40 22.7
50 40 23.7
Lumber
50 40 24.7
and
50 40 25.
1200
1300
1400
1500
1600

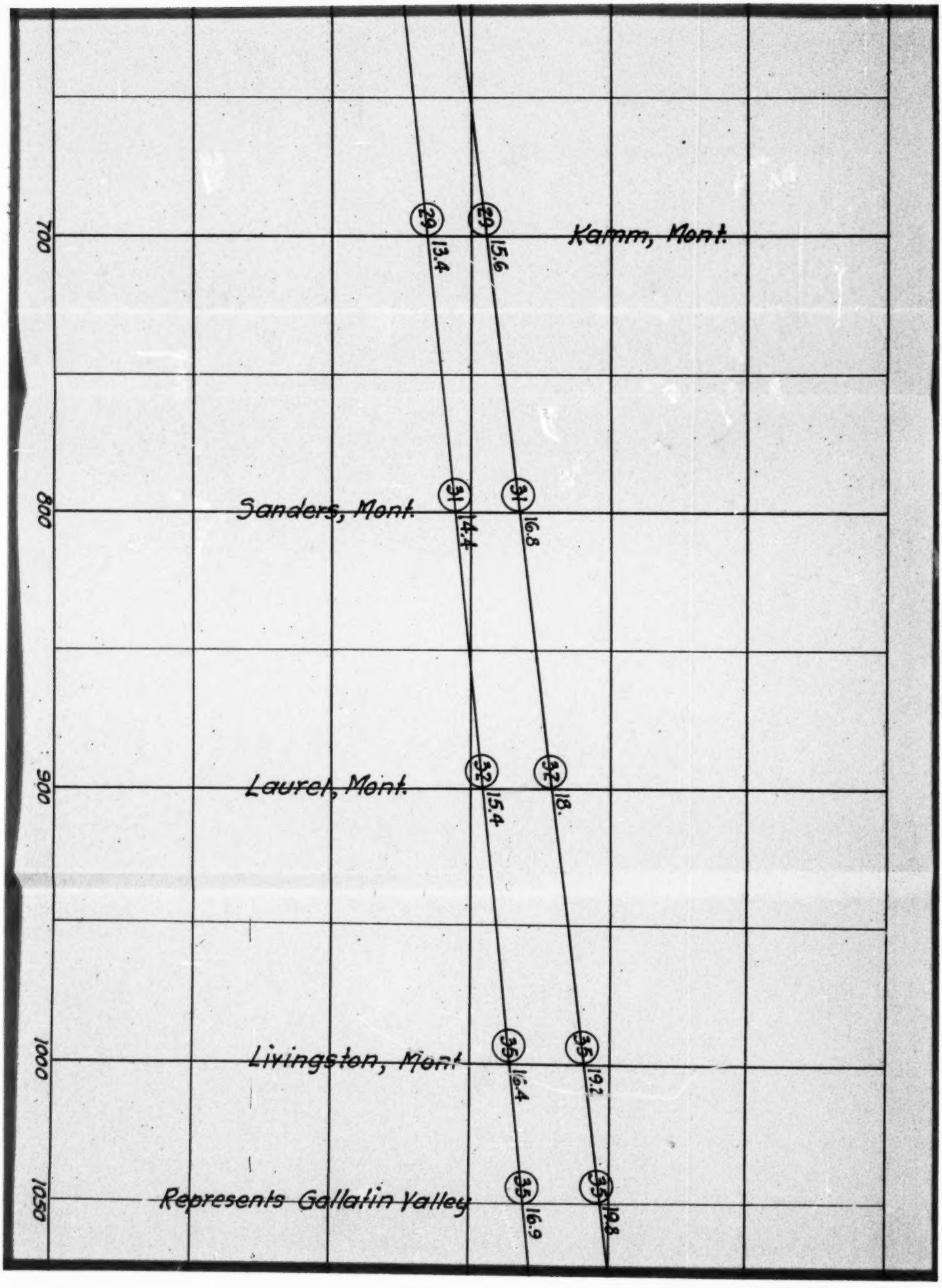
Note: Encircled figures Rates in effect June 1st 1907. from Tacoma to points east thereof.
□ Shows where shingle rates are higher than lumber.
Other figures Proposed Minnesota Rates and extension thereof to 1900 Miles.

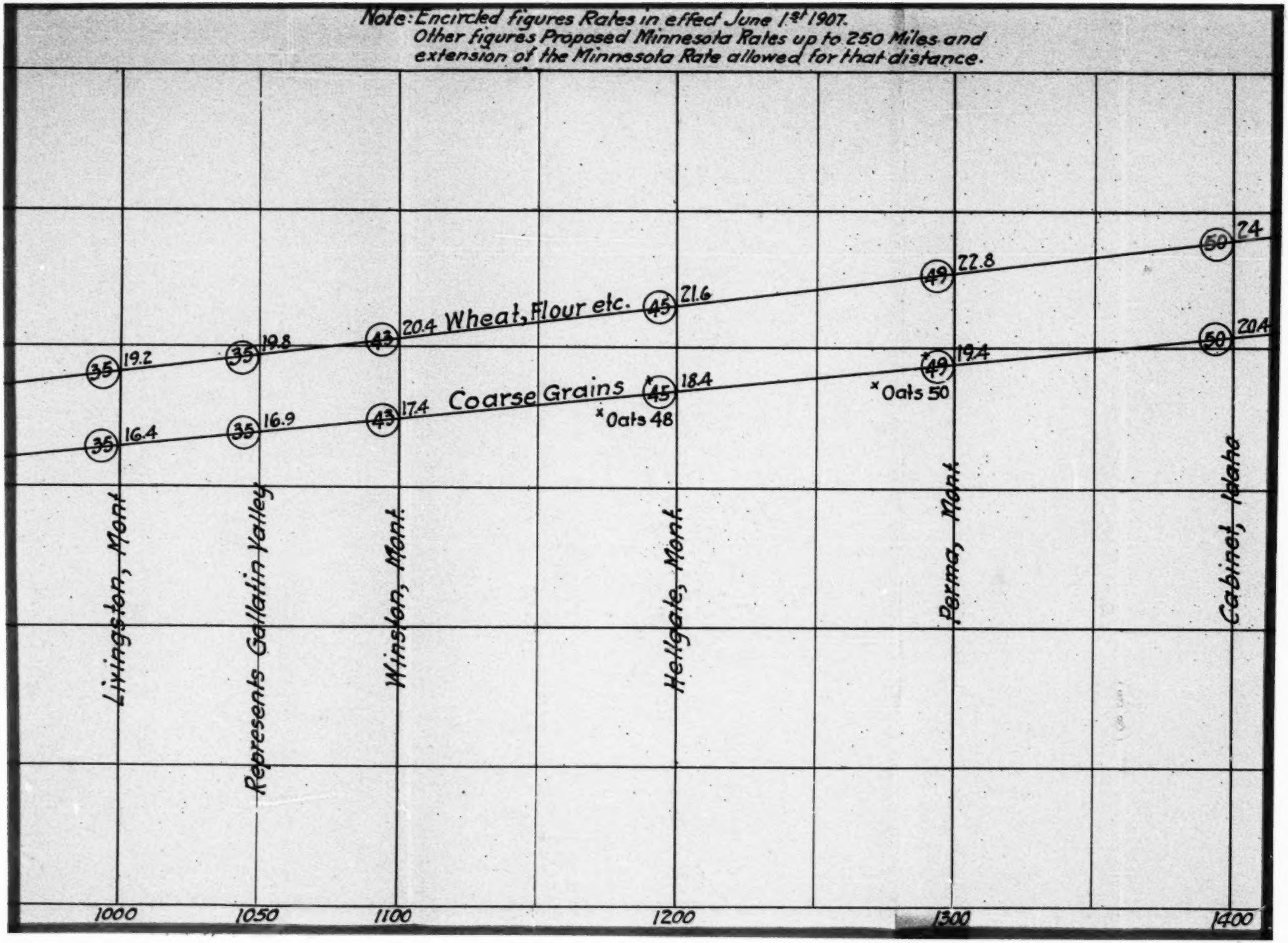
Plat E



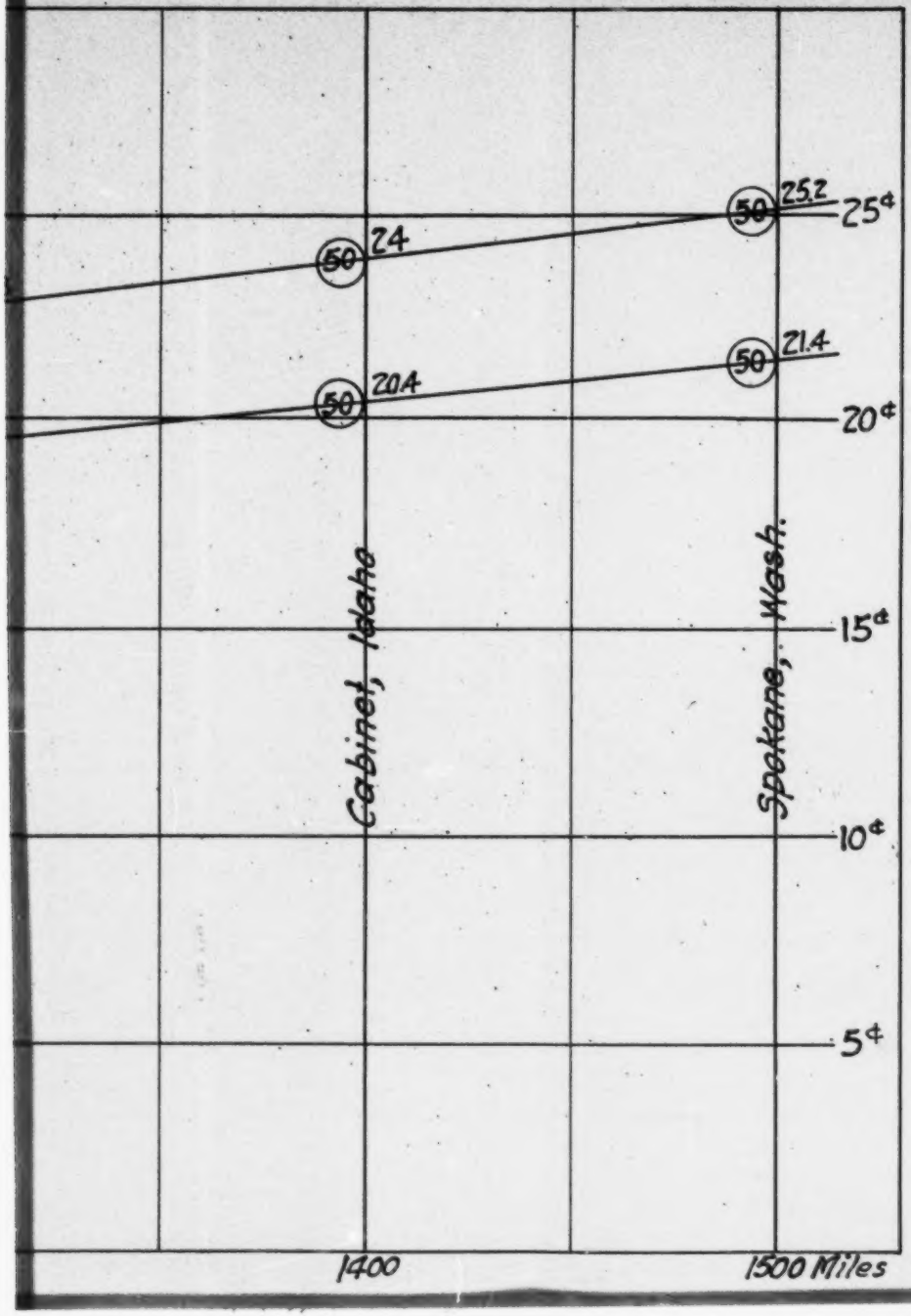

25¢
20¢
15¢
10¢
5¢
Minneapolis, Minn.
Clear Lake, Minn.
Darling, Minn.
Wadena Jct. Minn.
Audubon, Minn.
Mapleton, N.D.
Berea, N.D.
Cleveland, N.D.
0
50
100
150
200
250
300
350
5.7
7.8
8.7
9.6
10.2
10.8
11.4
9.9
9.4
8.9
8.4
7.6
7

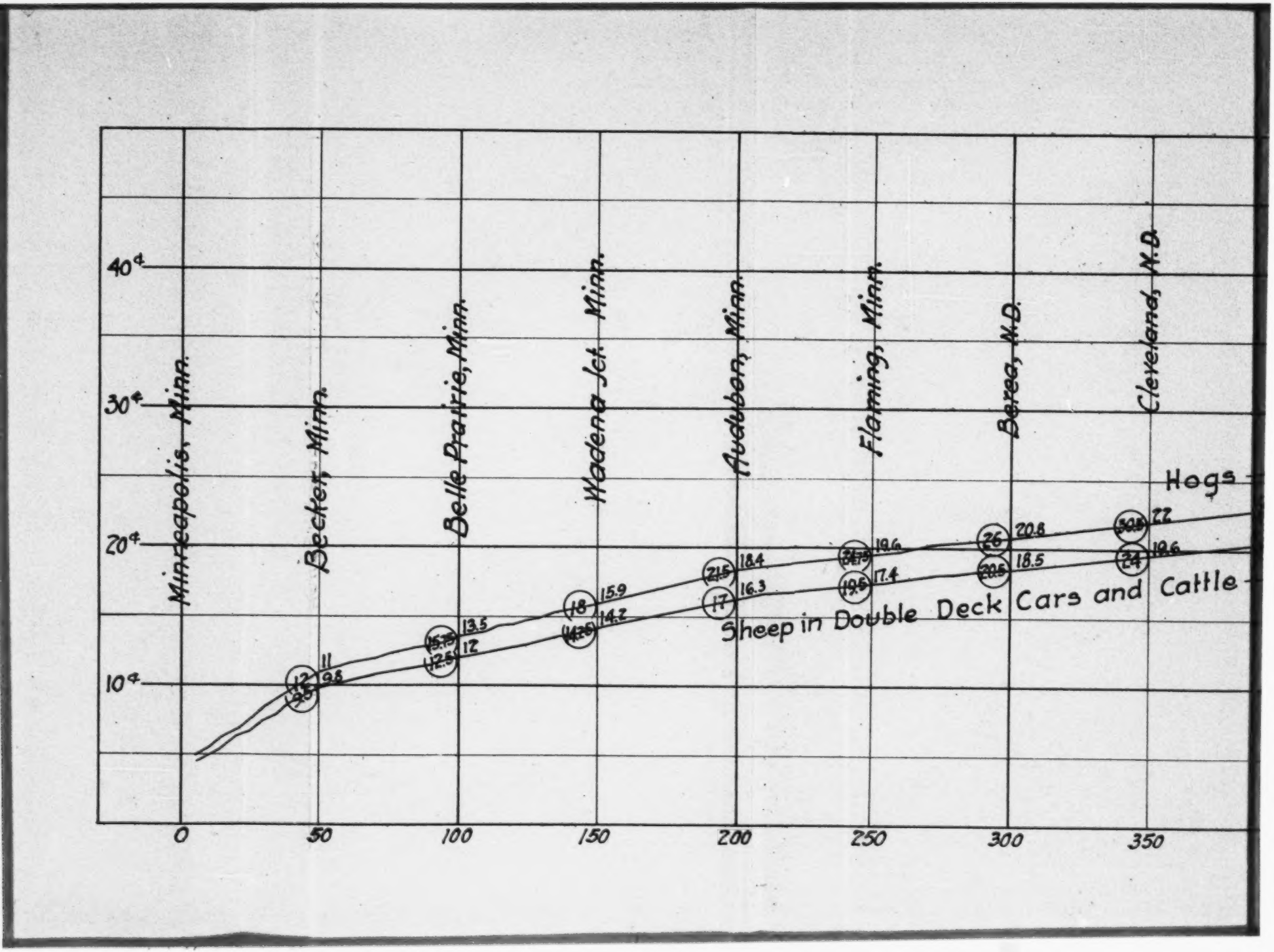

Berea, N.D.
Cleveland, N.D.
Driscoll, N.D.
Eagles Nest, N.D.
De Mores, N.D.
Kamma, Mont.
300
350
400
500
600
700
13 10.8
15 11.4
16 12 Wheat, Flour etc.
18 13.2
20.5 14.4
29 15.6
13 9.4
15 9.9
16 10.4 Coarse Grains
18 11.4
20.5 12.4
29 13.4

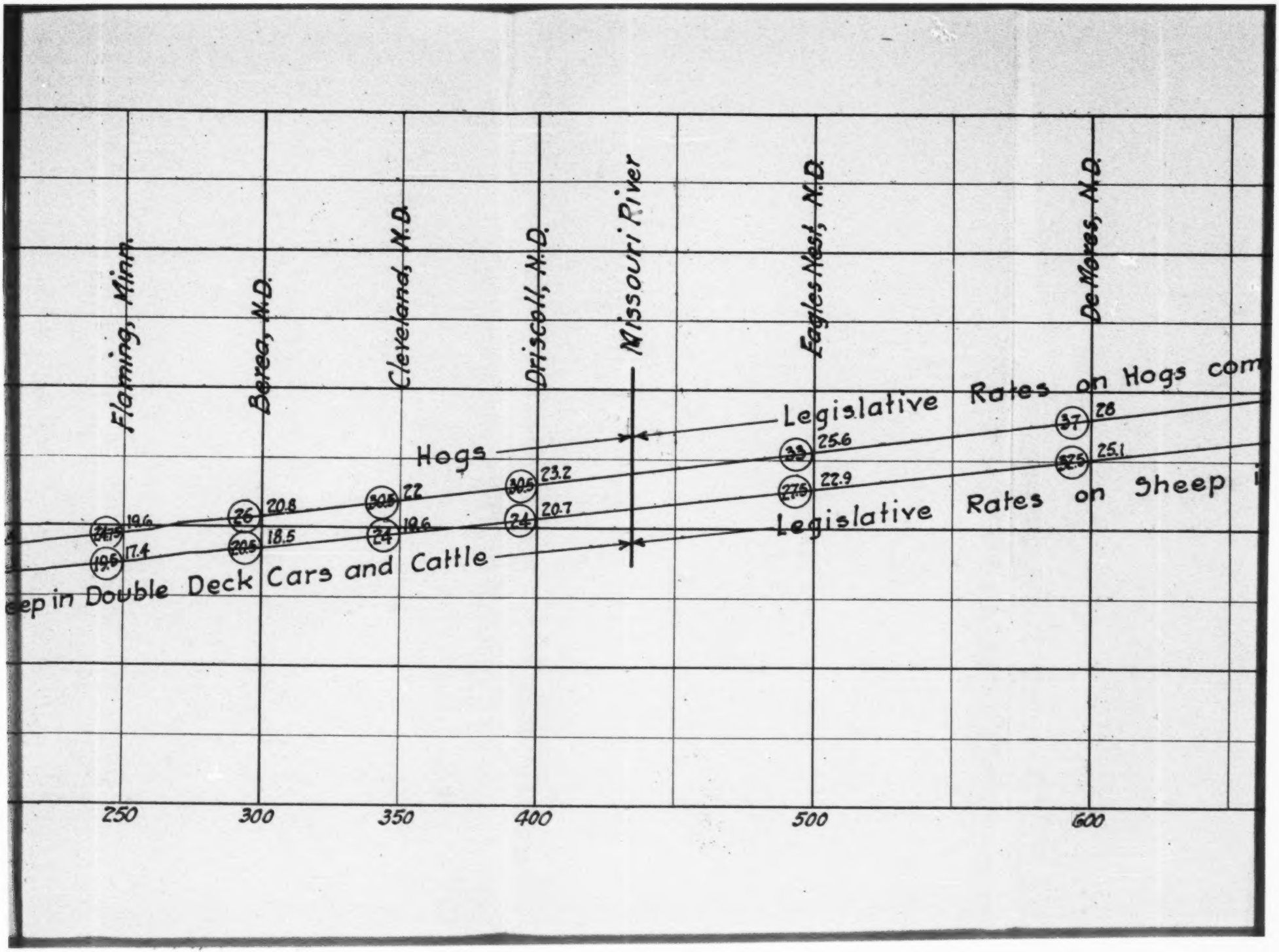

700
800
900
1000
1050
29
13.4
29
15.6
Kamm, Mont.
31
14.4
31
16.8
Sanders, Mont.
32
15.4
32
18.
Laurel, Mont.
35
16.4
35
19.2
Livingston, Mont.
35
16.9
35
19.8
Represents Gallatin Valley

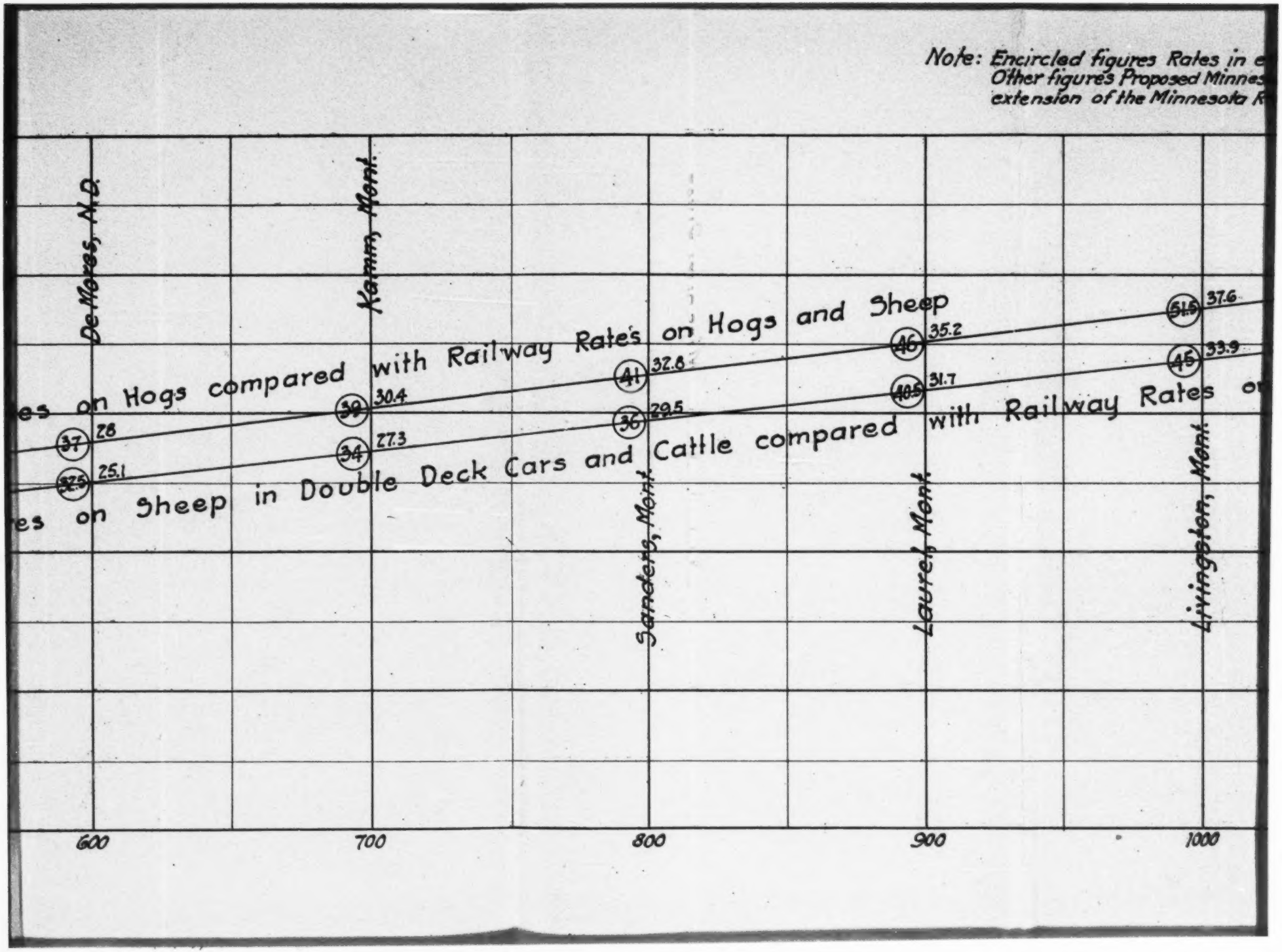

Note: Encircled figures Rates in effect June 1st 1907.
Other figures Proposed Minnesota Rates up to 250 Miles and extension of the Minnesota Rate allowed for that distance.
Wheat, Flour etc.
Coarse Grains
Represents Gallatin Valley
Livingston, Mont.
Winston, Mont.
Helgate, Mont.
Perma, Mont.
Cabinet, Idaho
35 19.2
35 19.8
43 20.4
45 21.6
49 22.8
50 24
35 16.4
35 16.9
43 17.4
45 18.4
49 19.4
50 20.4
x Oats 48
x Oats 50
1000
1050
1100
1200
1300
1400

Plat D-1


25.2
50
25¢
24
50
21.4
50
20.4
50
20¢
15¢
10¢
5¢
Cabinet, Idaho
Spokane, Wash.
1400
1500 Miles

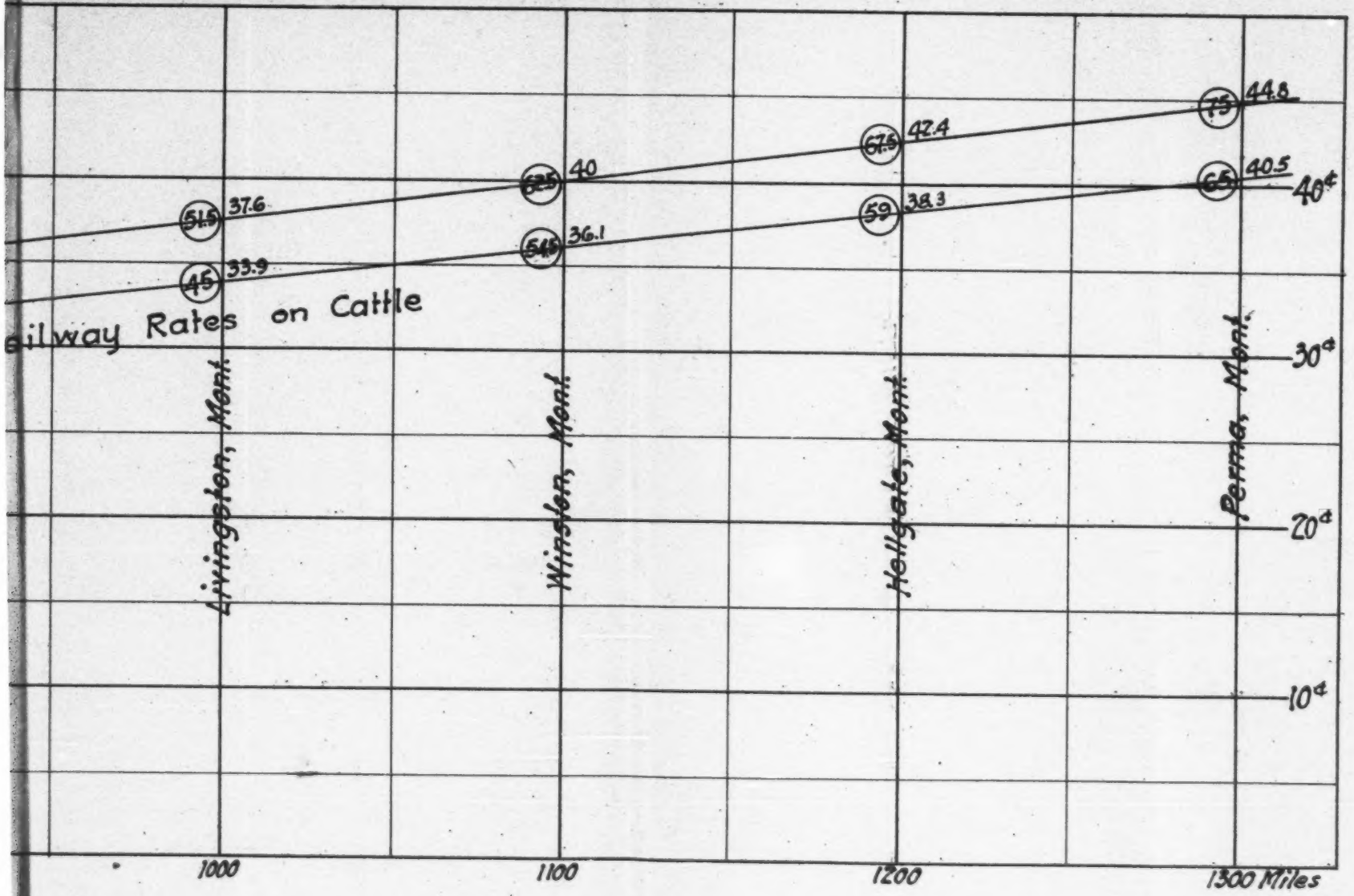

Minneapolis, Minn.
Becker, Minn.
Belle Prairie, Minn.
Wadena Jct. Minn.
Audubon, Minn.
Flaming, Minn.
Berea, N.D.
Cleveland, N.D.
40¢
30¢
20¢
10¢
0
50
100
150
200
250
300
350
Hogs
Sheep in Double Deck Cars and Cattle
11
9.8
13.5
12
15.9
14.2
18.4
16.3
19.6
17.4
20.8
18.5
22
19.6


Fleming, Minn.
Bora, N.D.
Cleveland, N.D.
Driscoll, N.D.
Missouri River
Eagles Nest, N.D.
De Mores, N.D.
Legislative Rates on Hogs com
Hogs
Legislative Rates on Sheep i
Cattle
ep in Double Deck Cars and
250
300
350
400
500
600
19.6
17.4
20.8
18.5
22
19.6
23.2
20.7
25.6
22.9
28
25.1


Note: Encircled figures Rates in e
Other figures Proposed Minnes
extension of the Minnesota R
es on Hogs compared with Railway Rate's on Hogs and Sheep
es on Sheep in Double Deck Cars and Cattle compared with Railway Rates o
De Mores, N.D.
Kamm, Mont.
Sanders, Mont.
Laurel, Mont.
Livingston, Mont.
37
28
32.5
25.1
39
30.4
34
27.3
41
32.8
36
29.5
46
35.2
40.5
31.7
51.5
37.6
45
33.9
600
700
800
900
1000

rcled figures Rates in effect June 1st 1907.
r figures Proposed Minnesota Rates up to 250 Miles and
nsion of the Minnesota Rate allowed for that distance.

Plat C-1



REPLY TO SOME THINGS SAID IN APPELLANTS' BRIEF.

Counsel for Appellants say in their brief (p. 301) that Exhibit 3-D Staples (Transcript Vol. 9, Case 599) shows an unharmonious, unsystematic, unrelated jumble of rates on grain and live stock, and elsewhere similar statements are made touching classified rates. But the record shows fully and clearly that, except where rates were blanketed or otherwise disturbed by crossing or proximity of shorter lines, the railroad rates in force before alteration by the commission and legislature were based on fixed relations between classes and on definite rules of progression with distance. Defendants' Exhibit Staples 3-F shows that the railroad companies maintained a fixed relation between rates on classified merchandise, which was as follows: first class 100%, second class 85%, third class 66%, fourth class 50%, fifth class 40%, class A 40%, class B 35%, class C 30%, class D 24%, class E 20%. These relations agree with those established by the railroad commission, except that the commission established 83½% for second class, 66⅔% for third class, 45% for class A and 25% for class D. If the rates given in Exhibit 3-F Staples be tested, they will be found, except in a few instances where the exhibit is erroneous as to computation, to bear the above fixed relations between classes, if fractions of cents are dropped in the computation. It was the railroad practice to disregard fractions of cents, while in determining rates under the commission's order fractions are retained down to mills. For example, Mr. Staples gave the Northern Pacific rate first class for 148 miles as 46c; disregarding fractions 85% of this gives the second class rate 39c, 66% gives the third class rate 30c, 50%

gives the fourth class rate 23c, 40% gives the fifth class and class A rate 18c, 35% gives the class B rate 16c, 30% gives the class C rate 14c, 25% gives the class D rate 11c, and 20% gives the class E rate 9c. Computation will disclose that the same relations between classes hold for each distance.

Mr. Staples himself testified (Case 599, Transcript Vol. 6, p. 2938-9) that there was a fixed percentage relation between classes in the tariffs of the railway companies when the commission made its order; not only so but that this relation was satisfactory in the main to the commission, that in establishing relations the commission disturbed very little the previous railway tariffs, and that the intention of the commission was to adopt the previously established relation and thus in the main to confirm the existing practice.

As to the progression of each rate with distance, counsel's idea that railway rates were full of inequalities and inconsistencies, which they seem to think is shown by Mr. Staples Exhibits 3-D and 3-F, is thoroughly exploded by the testimony. These exhibits show rates for the *distances* stated but name no stations. Consequently it cannot be told, and Mr. Staples could not tell, between what points the rates named were charged. See Mr. Staples testimony Case 599, Transcript Vol. 6, p. 2933-38. The testimony abundantly shows that the inequalities and inconsistencies alluded to by counsel come under two heads; (a) the three northern roads, the Great Northern, Sault Ste Marie and Northern Pacific, maintained lower rates on grain and allied products of the soil and higher rates on merchandise than the roads in the southern portion of the state (Staples testimony, Case 599, Vol. 6, p. 2636, 2719), but there is nothing seriously vicious in this; (b) departures from the normal rate

where the long line met the competition of a shorter line. Staples Exhibits 3-D, 3-E and 3-F, a portion of 3-E being copied on page 310 of brief of counsel for Appellants, name no stations and for distances above 220 miles on the Great Northern and Northern Pacific have evidently taken the abnormal rates prevailing in the territory between Winnipeg Junction and Crookston, as to which the conditions will presently be explained. As to the Northern Pacific rates for 150, 200 and 220 miles, contained in these statements, they are clearly erroneous. Baird's Exhibit 45 shows that the Northern Pacific rate for 150 miles, which is Wadena Junction on the main line, is 50c, to Audubon, 200 miles on the same line, is 60c and for 220 miles the rate would be 64c. It is sought to be inferred from the rates named in these exhibits, in part copied on p. 310 of counsel's brief, that the railway tariffs were based on no regular or consistent rate of progression.

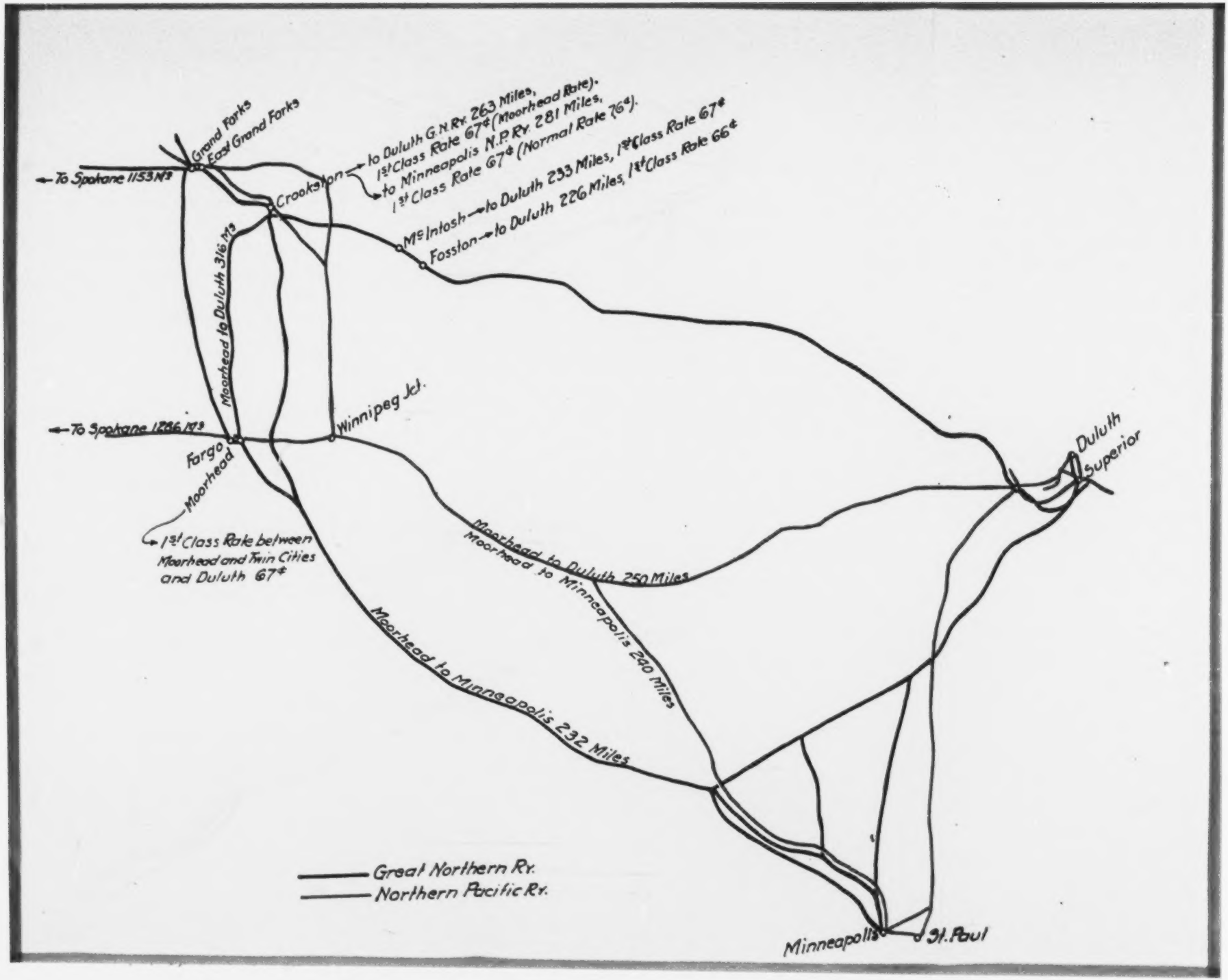
But in Case 600, Vol. 3, p. 888-890, Mr. Maguire showed the rate of progression on which the railroad tariffs were based, and Maguire's Exhibits 45 and 46 show what were normal railway rates when unaffected by short line competition, and that they were based on a uniform rate of progression, that is, 3c per five miles up to 35, 2c per five miles 35 to 60 miles and 1c per five miles 60 miles or over (See Maguire's Exhibit 45). Baird's Exhibit 45, Vol. 10, Case 599, shows Northern Pacific rates on Northern Pacific main line running west through Moorhead, and these rates will be found, up to 400 miles where the rate of progression decreases, to conform to the Great Northern basis as explained by Maguire.

Mr. Staples in making his exhibits (See supplement to Exhibit 3-E Staples) seems to have based his com-

putations on distances from Minnesota Transfer, which is midway between Saint Paul and Minneapolis, the latter cities being 10 miles apart. Why he did this is difficult to understand, because it is abundantly shown in the evidence and is admitted on all hands that the tariffs are based on mileage to and from Minneapolis, which is five miles less to Great Northern points and two miles less to Northern Pacific points than is Minnesota Transfer.

While Mr. Staples could not give the stations between which the rates shown in his exhibits were charged, the supplement to Exhibit 3-E Staples shows that he took the Northern Pacific rates on the branch line running north from Winnipeg Junction through Crookston to Grand Forks.

That the rates in this territory used in Mr. Staples exhibits and by counsel show no progression above the Moorhead rate of 67c results from competition of shorter lines and was fully explained in the testimony. The following sketch will perhaps make the matter clearer.


Grand Forks
East Grand Forks
To Spokane 1153 Mls
Crookston
to Duluth G.N.Ry. 263 Miles,
1st Class Rate 67¢ (Moorhead Rate).
to Minneapolis N.P.Ry. 281 Miles,
1st Class Rate 67¢ (Normal Rate 76¢).
McIntosh → to Duluth 233 Miles, 1st Class Rate 67¢
Fosston → to Duluth 226 Miles, 1st Class Rate 66¢
Moorhead to Duluth 316 Mls
Winnipeg Jct.
To Spokane 1286 Mls
Fargo
Moorhead
1st Class Rate between
Moorhead and Twin Cities
and Duluth 67¢
Moorhead to Duluth 250 Miles
Moorhead to Minneapolis 240 Miles
Moorhead to Minneapolis 232 Miles
Duluth
Superior
Great Northern Ry.
Northern Pacific Ry.
Minneapolis
St. Paul

The rate to Moorhead of 67c is based on the short mileage to Minneapolis, that is 232 miles, by the Great Northern and is the normal rate for this distance. At Moorhead this rate must be accepted by the Northern Pacific, via which Minneapolis is 240 miles, and the Northern Pacific makes the same rate Moorhead to Duluth, 250 miles by its line, which is the short mileage to Duluth. Between Moorhead and Winnipeg Junction on the south and Crookston and Grand Forks on the north the rates both to Minneapolis and to Duluth are the same. Most of this territory is covered by a blanket rate. Crookston has the same rate to Duluth as Moorhead, because of the Great Northern line from Moorhead through Crookston and Fosston to Duluth. This blanketing has the approval of the Minnesota Railroad Commission and always has had. An exactly similar condition of apparent discrepancy and inconsistency would exist, and was intended by the commission to exist, under the use of the proposed new tariffs, and yet these are the very irregularities and inconsistencies mentioned by counsel. See testimony of Mr. Staples, Case 599, Vol. 6, p. 2768-71, 2797-2807, 2821-2; Maguire, Case 600, Transcript Vol. 3, p. 888-9 and Exhibit 45 Maguire.

The criticisms and remarks of counsel, their brief pp. 310-11 and elsewhere, on the subject of extending rates to Spokane are wholly based on the abnormal rates in the blanketed territory referred to.

The extensions of various rates to Spokane exhibited and illustrated in our brief are extensions of normal rates. In criticism of these extensions counsel for the state have seized on rates which, while perfectly just and legal, are abnormal because necessarily based on shorter than the apparent mileage. Counsel might have shown that the rate from Duluth to Fosston

on the Great Northern, 226 miles, is 66c and to Moorhead, 90 miles beyond Fosston, is 67c. Counsel's method of extending rates would warrant an extension to Spokane of this 1c rate for 90 miles, which would give a rate at Spokane 1134 miles from Moorhead of 12.6c increase over Moorhead. Indeed counsel should have gone farther and have contended that, because there is *no* progression or increase of rates for considerable distances in the Red River Valley between Moorhead and Crookston, the rate to Spokane ought to be ascertained or tested by an extension to Spokane without any progression.

Counsel say, brief p. 307, that "400 miles is a longer haul than any railroad involved has in the state," the argument being that it is illogical to extend to 1500 or 2000 miles the state rate for the last part of the 400. But counsel are in error as to the facts. St. Paul to Noyes by the Great Northern is 391½ miles, St. Paul to Warroad by the Great Northern is 432 miles, Pipestone to Noyes by the Great Northern is 423½ miles and Pipestone to Warroad by the Great Northern is 464 miles.

CHARLES W. BUNN.

4

Supreme Court, U. S.
FILED.
FEB 12 1912
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

GEORGE T. SIMPSON, et al.,
Appellants,
vs.
DAVID C. SHEPARD,
Respondent.
No. 291.

GEORGE T. SIMPSON, et al.,
Appellants,
vs.
EMMA B. KENNEDY, Executrix, et al.,
Respondents.
GEORGE T. SIMPSON, et al.,
Appellants,
vs.
HENRY A. JAMES,
Respondent.
Consolidated
No. 292.

GEORGE T. SIMPSON, et al.,
Appellants,
vs.
WILLIAM SHILLABER,
Respondent.
No. 293.

RESPONDENTS' BRIEF.

JARED HOW,
HALE HOLDEN,
PIERCE BUTLER,
WILLIAM D. MITCHELL,
Solicitors for Respondents.

POOR COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

GEORGE T. SIMPSON, et al.,
Appellants,
vs.
DAVID C. SHEPARD,
Respondent.
No. 599

GEORGE T. SIMPSON, et al.,
Appellants,
vs.
EMMA B. KENNEDY, Executrix, et al.,
Respondents.

GEORGE T. SIMPSON, et al.,
Appellants,
vs.
HENRY A. JAMES,
Respondent.
Consolidated No. 600

GEORGE T. SIMPSON, et al.,
Appellants,
vs.
WILLIAM SHILLABER,
Respondent.
No. 601

RESPONDENTS' BRIEF.

This brief is in support of that part of the decree appealed from which adjudges that the laws and orders complained of are void, because in violation of the Commerce Clause of the Constitution of the United States. A separate brief has been filed by respondents in support of that part of the decree which adjudges that the laws and orders complained of are void because they prescribe confiscatory rates in violation of the Fourteenth Amendment of the Constitution.

ARGUMENT.

Each of the Laws and Orders complained of in these suits is void for the reason that it is violative of Section 8, Article 1 of the Constitution of the United States providing that

> **"The Congress shall have power—to regulate commerce with foreign nations and among the several States and with the Indian tribes."**

A.

Principles of construction of the Commerce Clause of the Constitution.

One of the principal necessities for the adoption of the Constitution of the United States was that of a central control of commerce among the States. General history, perhaps, may lay more importance upon that portion of the Commerce se of the Constitution which gives the Congress power to regulate commerce with foreign nations than upon that which gives it power to regulate commerce among the States; but a close examination into conditions existing immediately prior to the Convention discloses that the commercial relations between the States themselves were cause for greater alarm so far as concerned the peace and prosperity of the people than the relations of the several States with foreign nations. Fiske in his "The Critical Period of American History," and in his chapter en-

titled "Drifting Toward Anarchy," says that in this period the States "began to make commercial war upon one another"; that Connecticut laid duties upon importations from Massachusetts; that "Pennsylvania discriminated against Delaware, and New Jersey, pillaged at once by both her greater neighbors, was compared to a cask tapped at both ends."

Instances of discrimination in commerce by one State against another are given by McMaster in Vol. 1 of his "History of the People of the United States", (pp. 404-6) as follows:

New York City had for a long time been supplied with firewood by vessels which came up through Hell Gate from Connecticut, and with vegetables, fruit and fowls by shallops which came across from New Jersey. In 1787 the New York Assembly passed an act providing that every shallop, wood-boat or sloop from New Jersey should be entered and cleared at the Custom House in the same manner as p ckets from foreign ports; and placed similar restrictions upon boats through Hell Gate from Connecticut.

New Jersey retaliated by placing a tax of $1,800 per year on four acres at Sandy Hook, which was within the State of New Jersey and had been purchased by New York for the purpose of maintaining a lighthouse. Connecticut did not retaliate officially, but a league of merchants bound its members under a severe penalty not to send into New York any article whatever, nor to furnish any craft bound for that State with any kind of lading for one year. The agreement was kept, but before the expiration of the year the Constitution had been framed. It is Fiske's view (ibid p. 175) that "but for the good work done by the Fed-

eral Convention another five years would scarcely have elapsed before shots would have been fired and seeds of perennial hatred sown on the shores that look toward Manhattan Island" so great was the bitterness engendered by the discriminatory measures of States against each other.

See also *Cook v. Pennsylvania*, 97 U. S. at p. 574.

It is not surprising, therefore, that in Gibbons v. Ogden, 9 Wheaton 1 (1824), at p. 231, it is declared by the Court that

> "if there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints";

and that in the Passenger Cases, 7 Howard 283 (1848), at p. 445, the Court said:

> "Before the constitution existed, the States taxed the commerce and intercourse of each other. This was the leading cause of abandoning the confederation and forming the constitution; more than all other causes it led to the result."

Nor is it surprising that, when the first attack was made upon the possession of the power by Congress and its compass, in 1824, the Court should have upheld it to the full extent, saying in Gibbons v. Ogden, *supra:*

> "This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution."

Again, in *Brown v. Maryland*, 12 Wheat. 446 (1827), the Court said:

> "It may be doubted whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by congress. It is not, therefore, a matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the States. To construe the power so as to impair its efficacy, would tend to defeat an object in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity."

By these cases, supplemented by the case of *Groves v. Slaughter,* 15 Peters 449 (1841), in which Mr. Justice Baldwin said:

> "that the power of congress 'to regulate commerce among the several States,' is exclusive of any interference by the States, has been, in my opinion, conclusively settled by the solemn opinions of this court, in *Gibbons v. Ogden,* 9 Wheat. 186-222, and in *Brown v. Maryland,* 12 Wheat. 438-446",

it would seem that the extent and exclusiveness of the power of Congress to regulate commerce among the several States had been finally and completely settled. But it appears that it had not been. In the License Cases, 5 Howard 504 (1847), Mr. Chief Justice Taney said:

> "It is well known that upon this subject a difference of opinion has existed and still exists, among the members of this court. But with every respect for the opinion of my brethren with whom I do not agree, it appears to me

to be very clear, that the mere grant of power to the general government can not, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States.

* * * * * * *

The controlling and supreme power over commerce with foreign nations and the several States is undoubtedly conferred upon congress. Yet, in my judgment, the State may, nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid unless they come in conflict with a law of congress."

But shortly after, in *Cooley v. Board of Wardens*, 12 Howard 299 (1851), the Court said:

"The grant of commercial power to congress does not contain any terms which expressly exclude the States from exercising an authority over its subject matter. If they are excluded, it must be because the nature of the power, thus granted to congress, requires that a similar authority should not exist in the States. * * * Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, a plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by congress."

In *Ex parte McNeil,* 13 Wall. 236 (1871), the Court for the first time classified governmental powers as between state and national. In that case it was said:

> "In the complex system of polity which prevails in this country the powers of government may be divided into four classes. Those which belong exclusively to the States. Those which belong exclusively to the National government. Those which may be exercised concurrently and independently by both. Those which may be exercised by the States, but only until Congress shall see fit to act upon the subject."

In the case of the State Freight Tax, 15 Wall. 232 (1872), the Court said:

> "The rule has been asserted with great clearness, that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress. Surely transportation of passengers or merchandise through a State, or from one State to another, is of this nature. It is of national importance that over that subject there should be but one regulating power."

This decision seems to have placed the power in Congress to regulate commerce among the States, so far as concerns transportation of passengers and freight, squarely in the second class defined in Ex parte McNeil, *supra,* that is to say, among those which belong exclusively to Congress.

Again, in *Welton v. Missouri,* 91 U. S. 275 (1875), the Court said:

"Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different States. The power to regulate it embraces all the instruments by which such commerce may be conducted. So far as some of these instruments are concerned, and some subjects which are local in their operation, it has been held that the States may provide regulations until Congress acts with reference to them; but where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all state authority.

"It will not be denied that that portion of commerce with foreign countries and between the States which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the General Government was to insure this uniformity against discriminating state legislation."

However, in 1877 the Granger Cases, so-called, came before the Court. The case of *Peik v. C. & N. W. Ry. Co.*, 94 U. S 164, involved the validity of a statute of Wisconsin providing maximum rates for transportation of persons or property carried within the State, or taken up outside the State and carried within it, or taken up inside and carried without. The validity of the law was sustained on the ground that

"Until Congress acts in reference to the relations of this company to interstate commerce it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern"; but it is clear that the point that the statute encroached upon the exclusive power of Congress to regulate interstate commerce was urged only faintly.

In *Wabash Ry. Co. v. Illinois,* 118 U. S. 557 (1886), the Court says in respect of this fact:

> "It will be seen, from the opinions themselves, and from the arguments of counsel presented in the reports, that the question did not receive any very elaborate consideration, either in the opinions of the court or in the arguments of counsel",

the question in the case being whether the State had the right to fix any traffic charges whatsoever, as to which question *Munn v. Illinois,* 94 U. S. 113, which was decided at the same time, was made the leading case.

In *Wabash Ry. Co. v. Illinois, supra,* a statute of Illinois similar in terms to that involved in *Peik v. C. & N. W. Ry. Co.* was before the Court. The Supreme Court of Illinois had held it valid on authority of *Peik v. C. & N. W. Ry. Co.* Upon writ of error to the United States Supreme Court the point was urged vigorously that the statute of Illinois encroached upon the exclusive power of Congress to regulate commerce among the States. This Court, in an exhaustive opinion through Mr. Justice Miller, reversed the decision of the Illinois court, and, after a review of all the cases, declared that

> "it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a State which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the States, is a valid law."

This seems to be the last word on the subject and by this decision any claim that the States may regulate interstate commerce whether or not Congress shall have exercised its power in that regard seems to have been foreclosed. To this point has come the development of the application of the law from the time when the power of Congress to regulate commerce was applied solely to commerce carried on by water traffic, for, as was said in *R. R. Co. v. Maryland,* 21 Wall. at p. 470,

> "no one then supposed that the wagons of the country which were the vehicles of this commerce (overland), or the horses by which they were drawn, were subject to National regulation",

through the days of canals and turnpikes to the days of great transcontinental systems of railroad traversing, as does the Northern Pacific, and as does the Great Northern, seven States with one continuous, straightaway line of track, and the very much larger portion of whose business is among the States.

We say development of the application of the law because there has been no change in the law itself but only in conditions which invoked its application. It was said by the Court in *In re Debs,* 158 U. S. 564 (1895):

> "Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same today as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

Meantime, and before the decision in *Wabash v. Illinois, supra,* in *County of Mobile v. Kimball,* 102 U. S. 691 (1880), the Court in construing the Commerce Clause of the Constitution had said:

> "The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the States which consists in the transportation, purchase, sale and exchange of commodities. Here there can of necessity be only one system

> or plan of regulations, and that Congress alone can prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. There would otherwise be no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens, and against the products and citizens of other States. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the States was to insure uniformity of regulation against conflicting and discriminating state legislation";

and in *Gloucester Ferry Co. v. Pennsylvania,* 114 U. S. 196 (1884), the Court had said:

> "It needs no argument to show that the commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by State legislation."

In *Crutcher v. Kentucky,* 141 U. S. at p. 47 (1890), the Court said:

> "To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Consti-

tution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, can not have the effect of depriving them of such right unless Congress should see fit to interpose some contrary regulation on the subject."

In *Illinois Central Railroad Co. v. Illinois,* 163 U. S. at p. 151 (1895), the Court held:

"By the act of June 15, 1866, C. 124, Congress, for the declared purpose of facilitating commerce among the several states, and the postal and military communications of the United States, authorized every railroad company in the United States whose road was operated by steam to carry over its road, bridges and ferries, as well passengers and freight as government mails, troops and supplies, from one State to another."

In *Western Union Tel. Co. v. Kansas,* 216 U. S. at p. 37 (1910), the Court says:

"We can not fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct only local business. It is of the last importance that the freedom of interstate commerce shall not be trammelled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general right of the States to regulate their strictly domestic affairs is fundamental in our

> constitutional system and vital to the integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the General Government, and not in hostility to rights secured by the Supreme Law of the Land."

And in the same case at p. 27:

> "But the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction as the adjudged cases abundantly show."

These declarations of this Court are of principles of construction of the Constitution. No one of them can, from the viewpoint of the historian, be considered as merely casual or as of only temporary significance or importance. Each of them possesses at least as much vigor now as it has ever possessed. They may, perhaps, be framed into fundamental principles as follows:

(a) Congress has full and exclusive power to regulate commerce among the states.

Gibbons v. Ogden, supra.
Groves v. Slaughter, supra.
Brown v. Maryland, supra.
State Freight Tax, supra.
Cooley v. Wardens, supra.
Asbell v. Kansas, 209 U. S. 251 (1907).

(b) This power is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.

Gibbons v. Ogden, supra.
Northern Securities Co. v. U. S., 193 U. S. at p. 335 (1903).
Louisville & Nashville R. R. v. Mottley, 219 U. S. at p. 480 (1911).

(c) Non-action by Congress in execution of this power is tantamount to a declaration by it that commerce among the States shall be free and without trammels excepting those imposed by the common law.

County of Mobile v. Kimball, supra.
Gloucester Ferry Co. v. Pennsylvania, supra.
Northern Securities Co. v. U. S., supra.

(d) The right to carry on interstate commerce is guaranteed by the Constitution and Laws of the United States, and is subject only to regulation by Congress.

Crutcher v. Kentucky, supra.
Western Union Tel. Co. v. Kansas, supra.
International Textbook Co. v. Pigg, 217 U. S. 91 (1910).

(e) The validity of a law of a State claimed to be in violation of the Constitution of the United States is to be determined from its necessary operation and effect and not from its expressed purpose or scope.

Minnesota v. Barber, supra.
Western Union Tel. Co. v. Kansas, supra.

(f) Any law of a State is unconstitutional and void if by its necessary operation and effect

1. It substantially and directly regulates interstate commerce;

2. It destroys or substantially burdens the right of those covered by it to carry on interstate commerce subject only to regulation by Congress, or directly burdens the prosecution of interstate business.

Crutcher v. Kentucky, supra.
Western Union Tel. Co. v. Kansas, supra.
International Text Book Co. v. Pigg, supra.

B.

Construction and effect of the Act to Regulate Commerce.

Soon after the decision in *Wabash Co. v. Illinois* was handed down the Congress passed the Act to Regulate Commerce (approved Feb. 4, 1887; 24 Stat. 379). It was declared by the Court in *Int. Com. Com'n v. B. & O. Rd. Co.*, 145 U. S. 263 (1891), that

> "The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights";

and in *Int. Com. Com'n. v. Chicago G. W. Ry.*, 209 U. S. 108 (1907), that

> "'Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits.'"

That is to say, manifestly, that as to those matters covered by the Interstate Commerce Act, common carriers were to be governed by the provisions of the Act, and as to all matters of interstate commerce not covered by the Act, they were to be untrammeled and uncontrolled, excepting by the rules of the common law. As to those matters of regulation of commerce

among the States not covered by the Interstate Commerce Act or other enactments of Congress, the rule must still apply that the inaction of Congress is tantamount to a declaration by it that they shall be free and untrammeled. As to those matters, apparently, even though Congress has not exercised its power of regulation, the power is still exclusive and any action of a State which "will necessarily amount to or operate as a regulation" is unconstitutional and void.

Let us see in what attitude laws of a State must stand with regard to those matters of regulation of commerce as to which Congress has acted. In *Gibbons v. Ogden, supra,* through Mr. Chief Justice Marshall, the Court said:

> "It has been contended that, if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject, and each other, like equal opposing powers. But the framers of our Constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, inconsistent with the Constitution, is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the

> State, though enacted in the exercise of powers not controverted, must yield to it";

and in *Gulf Ry. Co. v. Hefley*, 158 U. S. 98 (1895), the Court said:

> "When a state statute and a federal statute operate upon the same subject matter, and prescribe different rules concerning it, and the federal statute is one within the competency of Congress to enact, the state statute must give way";

and, further:

> "The question is not whether, in any particular case, operation may be given to both statutes, but whether their enforcement may expose a party to a conflict of duties. It is enough that the two statutes operating upon the same subject-matter prescribe different rules. In such case one must yield, and that one is the state law."

In *Northern Securities Co. v. U. S. supra*, at p. 333, the Court said:

> "An act of Congress constitutionally passed under its power to regulate commerce among the States and with foreign nations is binding upon all; as much so as if it were embodied, in terms, in the Constitution itself. Every judicial officer, whether of a national or a state court, is under the obligation of an oath so to regard a lawful enactment of Congress. Not even a State, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise, the Government and its laws might be prostrated at the feet of local authority. *Cohens v. Virginia*,

6 Wheat. 264, 385, 414. These views have been often expressed by this Court."

Therefore, it appears that another postulate may be safely framed as follows:

(g) The Act to Regulate Commerce is the supreme law of the land as to all matters covered by it; and any law of a State which substantially interferes with it or hampers its enforcement is void.

It may be well here to dispose of one contention which we have reason to believe will be made against us, although, as will appear hereafter, it will not matter how that contention is disposed of. The first section of the Act to Regulate Commerce contains a proviso as follows:

> "*Provided, however,* that the provisions of this Act shall not apply to the transportation of passengers or property or to the receiving, delivering, storage or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid."

It is apprehended that it will be urged that whatever argument we may make that the laws and orders complained of are invalid through the fact that they interfere with the power of Congress to regulate interstate commerce will be met fully by the application of this proviso. It will be urged that whatever their effect in working discrimination against interstate commerce, the proviso properly construed will save the laws and orders from condemnation on the ground

that they violate the Constitution of the United States. In the very first instance, therefore, the question of such proper construction of the provision should be determined. In order that we may deal with the question fairly, let us consider: First, the effect of state laws working, either by their express intent and design or by their necessary operation, discriminating against interstate commerce, prior to the existence of the Act to Regulate Commerce, or wholly apart from the application of the provisions of that Act. Second, the effect of such laws under the operation of the Act to Regulate Commerce.

First: In *West, Attorney General v. Kansas Natural Gas Company et al.*, 221 U. S. 229 (1911), this Court says, quoting the decision of the United States Circuit Court of Appeals, Eighth Circuit, in *Haskell, Governor, et al. v. Cowham*, 187 Fed. Rep. 403:

> "No State by the exercise of, or by the refusal to exercise, any or all of its powers, may prevent or unreasonably burden interstate commerce within its borders in any sound article thereof.
>
> "No State by the exercise of, or by the refusal to exercise, any or all of its powers, may substantially discriminate against or directly regulate interstate commerce or the right to carry it on."

The Act to Regulate Commerce was not under consideration. Indeed, it had nothing whatsoever to do with the matters disposed of by this decision. Neither in the case in this Court nor in the case before the Circuit Court of Appeals, from which it quoted, was the Act mentioned. The decision in each case was predicated upon the Constitution and not upon any

law of the United States. One of the premises of the Circuit Court of Appeals upon which it bases the principles by it declared and which were adopted by this Court is that

> "The silence or inaction of Congress relative to such a subject is a conclusive indication that it intends that interstate commerce therein shall be free, and any law or act of a state or of its officers which prohibits it or substantially restrains its freedom is violative of the Constitution and void." (ibid p. 408.)

The decision, though made long after the enactment of the Act to Regulate Commerce, was based on the principles existing, without the aid of that act or any other act, and through sustenance of the Constitution alone. It seems, then, that if Congress had never exercised its power of regulation of carriers given to it by the Commerce Clause of the Constitution, any law of a State, the operation and effect of which would have been necessarily to discriminate against interstate commerce of carriers or to compel carriers to regulate their interstate business with reference to the provisions of such law, would have been void; and void by virtue of the Constitution.

Second: The remaining consideration is whether, inasmuch as a state law, which, by its necessary operation and effect, discriminates against interstate commerce, is void, such a law can be rendered valid either by express or by implied permission of Congress. It certainly could not, unless it is competent for Congress to except from the grant of power as contained in the Constitution, any exercise of that power comprehended

within the grant or any means of the enforcement of that power necessary to the preservation of the power itself. Congress could have refused or neglected to exercise the power to its full extent or to any extent, but that would not have been tantamount to an entire or partial surrender of the power nor would it have conferred upon any State the right to trespass upon the domain covered by the power. It was said by the Court in *Cooley v. Board of Port Wardens,* 12 Howard, at p. 318 (1851) that

> "If the constitution excluded the States from making any law regulating commerce, certainly congress cannot regrant or in any manner reconvey to the States that power";

and in *Gunn v. Barry,* 15 Wall. at p. 623 (1872) that

> "Congress cannot, by authorization or ratification, give the slightest effect to a state law or constitution in conflict with the Constitution of the United States. That instrument is above and beyond the power of Congress and the States, and is alike obligatory upon both."

If Congress could not have itself pronounced that the proviso should be construed as yielding to the States the power to make rates in such manner as necessarily to regulate, limit or destroy interstate commerce, or to interfere with the exclusive power of Congress in that regard, manifestly no court is at liberty to construe the proviso to the effect that such meaning was intended for it.

Clearly then, the proviso may not be properly construed as yielding to the States power which the Con-

stitution of the United States has put in the National Government, nor as enabling States to exercise their inherent and conceded powers in any such manner as will impair the power of Congress under the Constitution.

It may still be contended that, conceding the principal objects of the Act to Regulate Commerce to be

> "to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination."
>
> *New Haven R. R. v. Int. Com. Com'n.*, 200 U. S. 361 (1905)—

and that it is the duty of the Interstate Commerce Commission under the Act to see

> "that no undue preferences are given to one place or places or individual or class of individuals, but that in all things that equality of right, which is the great purpose of the interstate commerce act, shall be secured to all shippers."
>
> *Int. Com. Com'n. v. Cin. N. O. & Tex. Pac. Co.*, 167 U. S. 479 (1896)—

we say that, conceding these to be the principal objects of the Act, it may be contended that it was the intention of the proviso to forbid only such discrimination between persons or localities as should exist between interstate rates alone; and that if a State shall see

fit to make rates for transportation within its limits such as will result necessarily in compelling a carrier either to adopt the same basis of rates for its interstate business or to discriminate against localities in other States, the law shall not apply and there shall be no redress under it. It is immediately patent that such a contention is without serious foundation—and for two particular reasons:

First: It ignores the basal cause of the abandonment of the federation and the adoption of the Constitution

(Passenger Cases, *supra*),

and the sole and only cause of the grant by the States to the Federal Government of the power to regulate commerce among the States.

Welton v. Missouri, supra.

Second: The Commerce Act provides (Section 3) not only that it shall be unlawful for any carrier to give any undue preference or advantage to any locality, but as well that it shall be unlawful for any carrier "to subject any particular * * * locality * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." If a carrier should voluntarily put in rates between the Twin Cities and Moorhead, Minnesota, on the North Dakota border, so much less than those between the Twin Cities and Fargo, North Dakota, one mile distant from Moorhead, as to work serious discrimination against Fargo, it would not be possible to argue that the Inter-

state Commerce Commission could not entertain a complaint by Fargo based on such discrimination because the rates so put in to and from Moorhead were for intrastate transportation between it and the Twin Cities or Duluth, the principal consuming and producing markets for both Fargo and Moorhead, notwithstanding the fact that the rates complained of were discriminatory against a locality in another State. The forbidding in the Act of discrimination *against* any locality "in any respect whatsoever" would necessarily be ignored in such an argument.

But manifestly if such a discrimination would be within the power of the Commission to remedy if the carrier put in its rates voluntarily, it would be equally within its power to prevent if the carrier put in the rates under command of the State. The proviso does not cover alone state-made rates, but rates for transportation wholly within a State by whatsoever agency made. And if the discrimination could not be prevented under the Act, it could not be prevented at all—for certainly North Dakota could not prevent it, unless indeed by retaliation; and it would be wholly to the interest of Minnesota that the discrimination should continue.

It is a substantive principle of law that "the history of the times and the defect or mischief which the statute was intended to remedy" (*Smith v. Townsend*, 148 U. S. 490 [1892]) may be resorted to for the purpose of construing a statute; and that the purpose being recognized, the statute should be given a construction broad enough to achieve the design of its makers. It was said of the Act to Regulate Commerce in *New Haven R. R. Co. v. Int. Com. Com'n., supra*, that

> "To this extent and for these purposes" (the securing equality of rates as to all, and the destroying of preferences and discriminations) "the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve."

It has been seen that the purpose of the Commerce Clause of the Constitution, under the power contained in which the Act was passed, was to prevent discrimination by States in their own favor and against other States. If one of the evils sought to be remedied was to prevent discrimination by one State in favor of a second State and against a third, or discrimination by one State between two particular localities in another State, history does not seem to disclose it. It may be that such evil existed; but, in any event, the great evil, so great as seriously to menace the peace of the country, was the practice of discrimination by States in their own favor and against other States. The necessity of eradicating this evil was the fundamental cause of the grant to Congress of the power to regulate commerce among the States. We contend, therefore, that the Act to Regulate Commerce should not receive a construction out of harmony with the design of the grant of the power in execution of which the Act was passed.

If this be true of the body of the Act, and it should be construed broadly enough to enable the Commission to prevent a discrimination against interstate rates in favor of state rates, what of the proviso? It is common learning that

> "A construction of a proviso to an act which makes the proviso plainly repugnant to the body of the act is inadmissible."
>
> *Dollar Savings Bank v. U. S.*, 19 Wall. 227.

And if we are correct in our position that an important object of the body of the Act is to remedy discrimination against interstate rates in favor of state rates, then a construction of the proviso which makes such discrimination remediless is impossible.

It is as common learning that

> "A proviso carves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as within the reason thereof."
>
> *U. S. v. Dickson*, 15 Peters 141.

We submit that one who, in full contemplation of the causes leading up to the Interstate Commerce Act, can find reasons for excepting from its application discrimination against an interstate locality in favor of a locality within a State must indulge in fantastic argument in support of them.

It is on these lines that the Court has construed the proviso in Sec. 22 that

> "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies";

saying in *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426 (1906):

> "That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the act. *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479, 494. And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law. *Cincinnati New Orleans & Texas Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184; *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479."

and, at page 446,

> "But it is insisted that, however cogent may be the views previously stated, they should not control, because of the following provision contained in Section 22 of the act to regulate commerce, viz: '* * * Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.' This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act."

We have shown completely, we think, that any construction of the proviso in question which is incon-

sistent with the design of the body of the Act, or which will by its effect impair, or interfere with the exercise of, the power granted by the Constitution of the United States to the National Government, is wholly inadmissible. What the proviso does mean is, we think, well stated by the court below in its decision in this case, as follows:

> "But counsel insist that, if Congress had the power to forbid this discrimination, it did not exercise it because it declared in the proviso to section 1 that the provisions of the interstate commerce act should not apply to transportation wholly within one state. But the main object of the act was to prevent every undue discrimination between parties and between localities. When it was enacted there was a crying evil in such discriminations, an insistent public demand for the remedy thereof, and a determined effort by the legislators to make the prohibitions of such discriminations as broad, searching, and effective as the Congress had the power to make them. It had, as we have seen, ample authority to forbid discriminations wrought by differences between intrastate and interstate rates, but none to prohibit discriminations caused by differences in rates for transportations wholly within a state. The act prohibits any undue discrimination in any respect whatever between localities under similar circumstances and conditions by any common carrier subject to its provisions. In the light of these facts, the natural and reasonable construction of the proviso in section 1 is that it was inserted out of abundance of caution to make sure that the broad terms of the act did not go beyond the constitutional power of the Congress and directly regulate intrastate commerce more than was necessary completely to regulate interstate commerce, and that it has no farther effect upon the subject

> of discrimination now under discussion. The evil the act was passed to remedy, the main purpose of its passage, the public demand for a prevention of all discriminations, the patent efforts of the legislators to meet this demand, and the broad terms of the prohibitions themselves compel the conclusion that the Congress intended to exercise, and that by this act it did exercise, its constitutional power to prevent discriminations of the character here in question to its utmost extent, and that the companies were and are prohibited thereby from making or maintaining the unjust discriminations between localities which the maintenance of their former lawful interstate fares and rates and the intrastate rates prescribed by the acts and orders of the officers of the state would necessarily effect. *Reliance Textile & Dye Works v. Southern Ry. Co.*, 13 Interst. Com. R. 48, 54." (Vol. 1 N. P. Rec. p. 411).

Whatever meaning may be given the proviso, it is manifest that if it be construed as assuming to grant by implication to the States greater power than was left to them under the Commerce Clause of the Constitution, it has no validity; if it be construed as assuming to surrender any part of the power granted to Congress by the Commerce Clause of the Constitution, it has no validity; if it be construed according to its terms as a mere declaration by Congress that it does not by the Act provide for regulation of commerce local to a State, then the most that can be claimed for it is that it leaves regulation of commerce local to a State in the same condition and subject to the same limitations as would have existed if the Act had not been passed—that is to say, subject to the inherent power of regulation existing in state governments, but

to be exercised only in such manner as will not destroy, discriminate against, regulate or in other material manner directly interfere with interstate commerce.

Relying upon the foregoing principles as axiomatic, and believing that it would be a mere work of supererogation to argue their correctness on principle or to cite further cases in support of them, we proceed to a consideration of the facts in the cases. We contend that each law and order complained of is in violation of the Commerce Clause of the Constitution of the United States for that, through its necessary and direct operation and effect,

(1) it either directly regulates interstate commerce or burdens the carriers subject to it in their transaction of interstate business, through destruction of or serious impairment in volume of such business;

(2) it compels the carriers subject to it either to surrender their right under the Constitution and Laws of the United States to transact interstate commerce freely, excepting as regulated by Congress, or to disobey the Act to Regulate Commerce;

(3) it renders non-performable the functions of the Interstate Commerce Commission as prescribed by the Act to Regulate Commerce.

Notwithstanding that the Master in his report to the Court has declared that his findings of fact upon the question of interference with interstate commerce are

established "by convincing and undisputed testimony" (p. 216 Vol. 1 N. P. Rec.), and that Circuit Judge Sanborn in his opinion has said that they are "sustained by clear and convincing evidence" (p. 407 Vol. 1 N. P. Rec.), we shall think it proper, in dealing with the facts and the applicability to them of principles of law which we consider material, to cite to this Court the evidence in support of the findings. We shall follow this course because we think it proper practice, and not because we are moved to it by assignments of error aimed at lack of evidence to justify a finding which has been made. Only one such assignment has been preferred in connection with the question of interference with interstate commerce; and we shall hope hereinafter to demonstrate that it is unsound, and that even if it is sound it can have no effect upon the ultimate decision of this Court upon this question.

C.

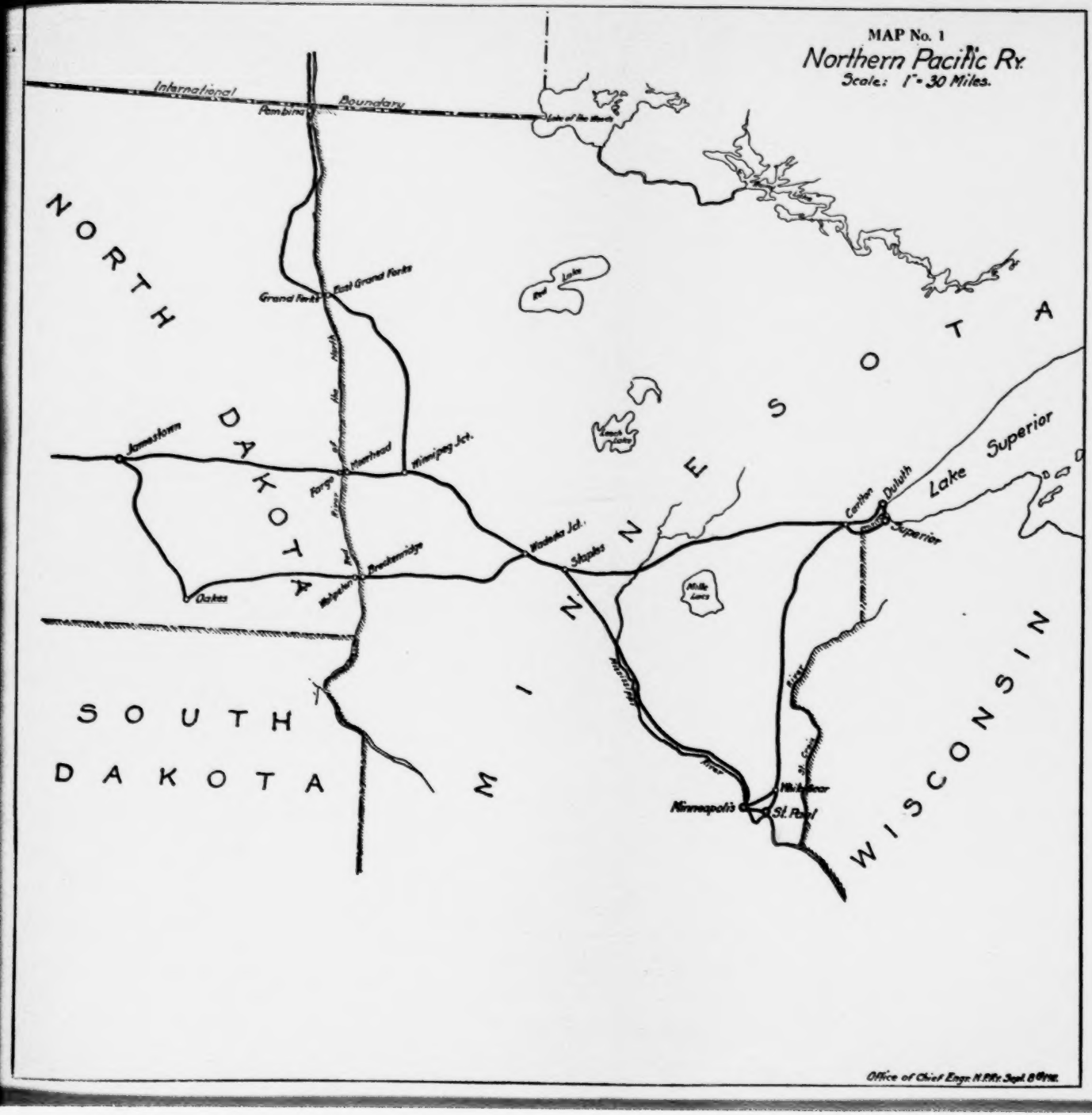
1. Each law and order complained of violates the Commerce Clause of the Constitution of the United States, for that, through its necessary and direct effect upon the carriers subject to it, it either regulates their interstate commerce or destroys their power to transact such commerce freely and without regulation, excepting that imposed by Congress.

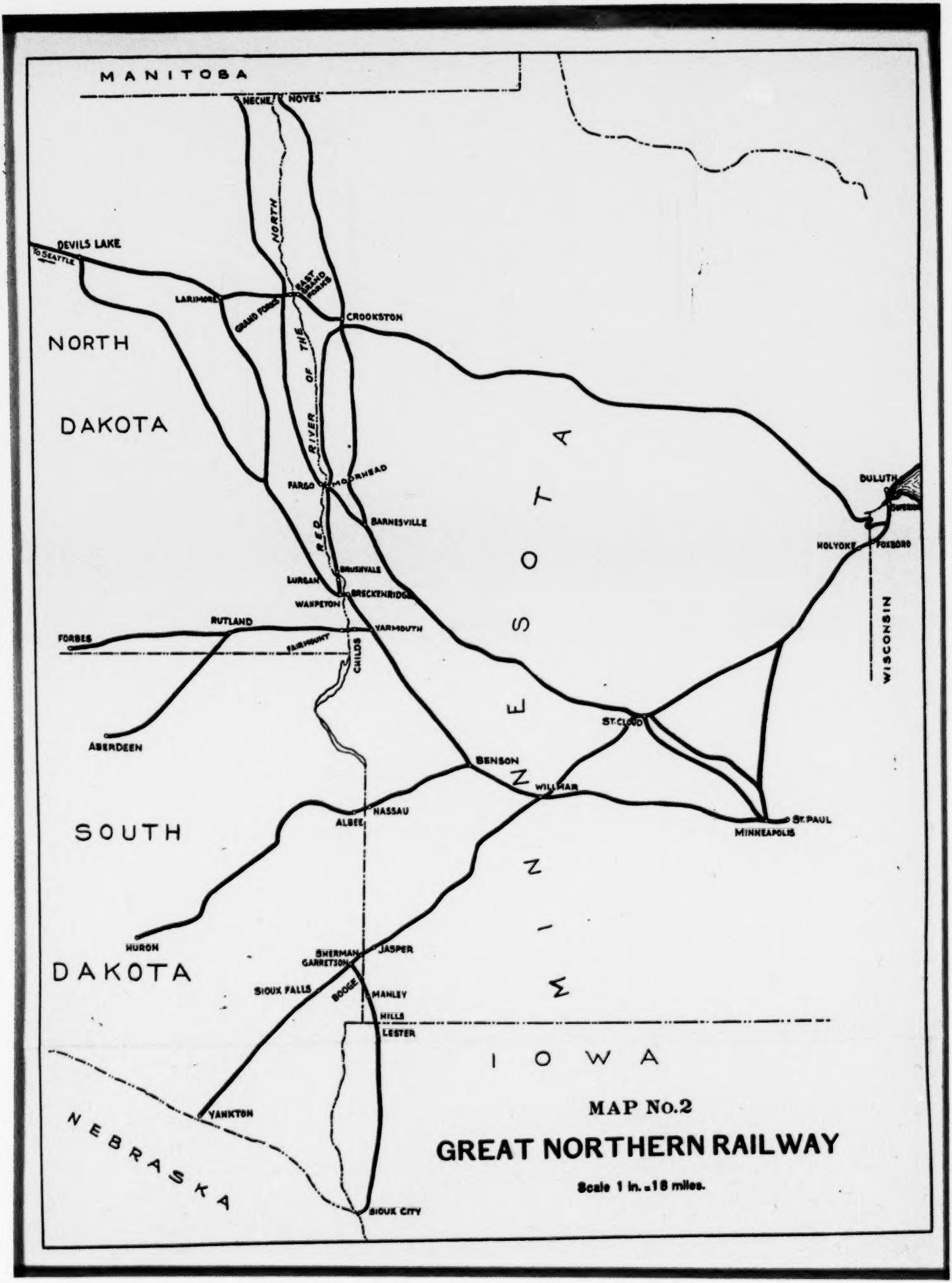
The Great Northern and Northern Pacific Railway companies, respectively, own and maintain lines of

railway extending from Superior, Wisconsin, and Duluth, Minnesota, which are situated side by side at the westerly end of Lake Superior, and from St. Paul and Minneapolis, Minnesota, in a general westerly direction across the State of Minnesota and through the States of North Dakota, Montana, Idaho, Washington, and Oregon to the Pacific Coast. Each of these companies has a line of railway extending across the State of Minnesota and into the State of North Dakota, leaving the State of Minnesota at Breckenridge, in that State, and entering the State of North Dakota at Wahpeton, in that State; a line extending across the State of Minnesota and into the State of North Dakota, leaving the State of Minnesota at Moorhead, in that State, and entering the State of North Dakota at Fargo in that State; and a line extending across the State of Minnesota and entering the State of North Dakota, leaving the State of Minnesota at East Grand Forks, in that State, and entering the State of North Dakota at Grand Forks in that State. A map of the Northern Pacific, marked "Map 1" is interleaved here. In order to prevent confusion, it shows nothing excepting what is of value in the immediate argument which it is intended to illustrate.

A map of the Great Northern, marked "Map 2," is also interleaved. It shows not only an illustration of the application of the present argument to that line, but also shows other lines of that system which are illustrative in subsequent argument.

The trend of merchandise covered by the Commission's Order and Supplemental Order is westward, so far as the traffic, whether local to any State or interstate between any two of them, of these companies in


MAP No. 1
Northern Pacific Ry.
Scale: 1" = 30 Miles.
International
Boundary
Pembina
Lake of the Woods
NORTH DAKOTA
Grand Forks
East Grand Forks
Red Lake
MINNESOTA
Jamestown
Fargo
Moorhead
Winnipeg Jct.
Lake Superior
Carlton
Duluth
Superior
Wadena Jct.
Staples
Brainerd
Oakes
Watertown
Mille Lacs
SOUTH DAKOTA
Minneapolis
St. Paul
WISCONSIN
Office of Chief Engr. N.P.Ry. Sept. 8th 1912.


MANITOBA
NECHE
NOYES
NORTH
DAKOTA
DEVILS LAKE
TO SEATTLE
LARIMORE
GRAND FORKS
EAST GRAND FORKS
NORTH
RIVER OF THE
CROOKSTON
RED
FARGO
MOORHEAD
BARNESVILLE
BRUSHVALE
LURGAN
BRECKENRIDGE
WAHPETON
RUTLAND
FORBES
FAIRMONT
YARMOUTH
CHILDS
ABERDEEN
MINNESOTA
DULUTH
SUPERIOR
HOLYOKE
FOXBORO
WISCONSIN
ST. CLOUD
BENSON
WILLMAR
ALBEE
NASSAU
SOUTH
DAKOTA
HURON
SHERMAN
GARRETSON
JASPER
SIOUX FALLS
BOOKE
MANLEY
HILLS
LESTER
MINNEAPOLIS
ST. PAUL
IOWA
YANKTON
NEBRASKA
SIOUX CITY
MAP No. 2
GREAT NORTHERN RAILWAY
Scale 1 in. = 18 miles.

the States of Minnesota, North Dakota, South Dakota, and Montana is concerned, as is also that of coal and lumber covered by Chapter 232—the Commodities Act. The trend of commodities other than coal and lumber covered by Chapter 232 is eastward.

Both Superior and Duluth are important business centers. The business of the two cities is similar in character. Each is a principal eastern terminal of the Great Northern and Northern Pacific for the distribution of merchandise and coal to the westward and for the receipt of grain, livestock and other farm products from the westward. Their conditions as far as transportation goes are and have been exactly similar; they have always been treated as if they constituted a single city; and the rates, whether in or out, accorded them by the carriers have always been the same. (Complainants' witness Baird, pp. 1474-5, Vol. 4 N. P. Rec.; Defendant Staples, pp. 2789-90, 2794-5, Vol. 6 N. P. Rec.)

The Interstate Commerce Commission has declared that "rates from Duluth and Superior must be the same" (*Hastings Malting Co. v. C. M. & St. P. Ry. Co.*, 11 I. C. C. Rep. 675 [1906]); and the propriety and even necessity of a parity in rates as between them seems never to have been questioned.

With regard to merchandise, it appears that in addition to the ordinary business of "jobbers" or distributors of merchandise, advantage is taken of the cheaper freight rates afforded over the Great Lakes during the open season of water transportation than are afforded over all-rail routes, and merchandise is shipped from localities in the south and east and is stored in warehouses in Duluth or Superior for subse-

quent distribution. (Defendant Staples, pp. 2789-90, Vol. 6, N. P. Rec.)

The Commission's Order established rates on merchandise between Duluth and other localities in Minnesota from 20 to 25% lower than the then existing interstate rates between Superior and localities in Minnesota. If such an inequality in rates as would have existed through the establishing by the Northern Pacific of the rates local to the State of Minnesota from Duluth as prescribed by the Order, and the maintaining of its then existing interstate rates from Superior to points in Minnesota, had been kept in force by the company, it would not seem to require the expert testimony of defendant Staples that Superior would have been "entirely out of business" in the distribution of merchandise (p. 2790, Vol. 6, N. P. Rec.) to justify the conclusion that that result would have necessarily followed. It would have required utter disregard of all economic principles applicable to the situation to avoid the conclusion, and the conclusion must cover not alone merchandise distributed from Superior but also merchandise brought there by water and transshipped there. Immediately and necessarily, then, the Northern Pacific was placed, as a result of the operation of the Order, in position of exercising its choice between reducing its interstate rates from Superior to localities in Minnesota to the basis of the prescribed local rates from Duluth and losing its power to transact interstate business in the carrying of merchandise from Superior into Minnesota; because it follows necessarily that if Superior could not transact interstate business with Minnesota in competition with Duluth under such an inequality of rates, the North-

ern Pacific could not transact such business for it. Whichever course the railway company chose to adopt would necessarily burden its interstate commerce between Superior and Minnesota by compelling substantial diminution in revenue derivable from such business.

The shores of St. Louis Bay, on the opposite sides of which Duluth and Superior, respectively, are situated, are lined with grain elevators and coal docks. Practically all the hard coal and much of the soft coal distributed into Minnesota comes over the lakes to the docks of one or the other of these ports; and wheat and other grain come in large quantities from the grain fields of Minnesota to the elevators of one or the other of these ports. The reduction in rates on commodities provided by Chapter 232, the Commodities Act, is of 7.377% below the existing interstate rates. When applied to commodities moving customarily by train-loads this is a substantial reduction. When applied to wheat, the value of which to the producer is measured by the price at a central terminal less the cost of transportation to that terminal and which is bought and sold upon a variation in price of a sixteenth, and even of a thirty-second of a cent a bushel, the reduction is more than merely substantial. Mathematical calculation shows that on this basis of calculating value the reduction in value of wheat shipped to an elevator in Superior by a producer in Minnesota 200 miles from Duluth and Superior is over 2/5 of a cent per bushel (60 lbs.) below the value of wheat shipped from the same locality to an elevator in Duluth, if the carrier shall install and maintain the reduced local rates to Duluth as prescribed by Chapter 232 and simultane-

ously maintain its present interstate rates between Minnesota and Superior. It goes without saying, as it does in the case of merchandise, that under such a disparity of rates the elevators in Superior can not transact business with the wheat producer of Minnesota; and that, if they can not, the carrier can not transact interstate business in the carriage of the wheat.

We have taken the rates on wheat merely by way of example. If the example is a fair one, and we have intended it to be, we think that it has been demonstrated that the necessary and direct effect of the operation of Chapter 232, if it shall go into effect, will be to compel the carriers to reduce their interstate rates on commodities covered by it to a substantial equality with the rates prescribed by it for local traffic in Minnesota, or suffer destruction of their power to carry on interstate business between Minnesota and Superior; and in either case to endure a substantial burden on their interstate commerce.

On the other side—the western boundary—of the State of Minnesota are situate Breckenridge, Moorhead and East Grand Forks. In immediate juxtaposition to them, respectively, are Wahpeton, N. D., Fargo, N. D., and Grand Forks, N. D. They constitute three several pairs of cities, one member of each pair situate in Minnesota and the other in North Dakota. The members of each pair are separated only by the Red River of the North, an inconsiderable stream in width. The members of each pair have always had the same rates in and out because they are so close together that they would be one city if they were not artificially separated by a boundary line between States; and they have always shipped and re-

ceived, and they do ship and receive, the same character of articles of trade. The stations in each pair are not more than one mile apart. Their shipping and receiving markets are the eastern terminals of the Great Northern and Northern Pacific companies (each of which serves them all), and they have no other available markets. (Complainants' witness Baird, pp. 1456-60, Vol. 4 N. P. Rec.; Complainants' witness Maguire, pp. 801-2, Vol. 3 G. N. Rec.; Defendants' witness Flinn, p. 2421, Vol. 6 N. P. Rec.) Whatever advantage through enterprise the North Dakota border cities may have realized, the Railroad and Warehouse Commission of Minnesota apparently proceeded to attempt to destroy. By its Supplemental Order of May 3, 1907, (p. 18, Vol. 1 N. P. Rec.), it formally constituted East Grand Forks, Moorhead, and Breckenridge "distributing centers or terminals," and prescribed, in addition to the 20 to 25 per cent reduction produced by its Order of Sept. 6, 1906, in rates on general merchandise from the eastern terminals of the Great Northern and Northern Pacific, a further reduction in inrates for carload lots of certain grocers' articles of 13.58 per cent. It would seem not to require expert testimony to establish the proposition that under such disadvantages as would exist through maintenance at the same time of the much lower basis of state rates prescribed by the Commission between Duluth, for example, as an eastern terminal, and the western Minnesota border towns, than that for interstate transportation between Duluth or Superior and the corresponding North Dakota border towns, the carriers would be deprived of the power to transact any substantial amount of such interstate business; but there is enough

evidence to the effect given by witnesses offered by either side. (Complainants' witness Maguire, pp. 838-9, Vol 3 G. N. Rec.; Complainants' witness Elliott, p. 1419, Vol. 4 N. P. Rec.; Defendant Staples, pp. 2916-7, Vol. 6 N. P. Rec.)

The basal facts which we have set forth in the argument last foregoing are found by Circuit Judge Sanborn, and the conclusions which the testimony establishes as proper to be drawn from them and which we contend must necessarily be drawn from them, even without any advice from experts, are drawn by him. (Opinion of Court below, p. 394, Vol. 1 N. P. Rec.)

To the conclusion which we have sought to demonstrate to be well grounded, the Court below adds that failure by the carrier to maintain substantially as low rates between Superior and localities in Minnesota as between Duluth and like localities "would seriously depreciate the value of the company's property in Superior." (Opinion, as last above.) The point apparently in the mind of the Court is that the necessary and direct effect of the laws and orders is or will be to compel the carriers subject to them to reduce their interstate rates to the basis of the state-made rates or suffer substantial depreciation in value, through the lessening of means of employment, of the instruments used by them in conducting interstate traffic. It is another burden on the interstate commerce of the carriers as a direct effect of the operation of the laws and orders complained of. It is so obviously an unavoidable effect that we think necessary only to call attention to it.

It seems that the result of reducing interstate rates to the basis of the state rates or suffering destruction

of the power to carry on interstate commerce would not be confined to cases of two towns, one in one State and the other in another State but situated so closely together as to form practically one town if arbitrary geographical lines be disregarded.

We quote from the testimony of Mr. Baird, General Freight Agent of the Northern Pacific Company, found at pp. 1455-6, Vol. 4 N. P. Rec.:

> "It would be impossible to maintain, for any length of time, a higher rate schedule at Wahpeton, Grand Forks, and Pembina, North Dakota, than at Breckenridge, Moorhead, East Grand Forks and St. Vincent, Minnesota; north of Wahpeton there are lines of railway paralleling the Red River, but on opposite sides, one line in Minnesota and the other in North Dakota; it would be impossible to make materially higher rates from points from and to the towns on the North Dakota lines than are made from and to opposite towns on the Minnesota lines, and, where these lines converge, the rates must be the same.
>
> Q. What would be the result of not making them the same? That is, if the line in Minnesota should have a lower rate than the line across the river in North Dakota, what would be the result?
>
> A. Why, the result would be that the business which is naturally tributary to the North Dakota towns would be absorbed by the towns on the east side of the river.
>
> Q. And you would lose the interstate business?
>
> A. Lose the interstate business.
>
> Q. And it would all go to a local line?
>
> A. Yes, sir.
>
> Q. Go on.

A. And this is especially true with respect to the grain rates. Farmers, as a rule, buy their supplies at the point where they market their grain. Any unfair adjustment in the rates on the latter which affect the ability of one point to ship grain on a substantial equality with other points in the same vicinity, affects the merchandise business of those towns to the same extent, and such an adjustment of the rates would constitute unjust discrimination against the town paying the higher rates and would disturb conditions which have long existed and on which the trade of those towns has been built up with the surrounding country."

(See also Defendant Staples, p. 2811, Vol. 6 N. P. Rec.)

The entire boundary line between Minnesota and North Dakota is composed of the Red River of the North. From Breckenridge, Minn., on one side of the river, and Wahpeton, N. D., on the other, there are lines of railway to the Canadian boundary. These lines are main lines or branches of main lines running to St. Paul, Minneapolis, Duluth and Superior—either of the Great Northern or Northern Pacific or both. The valley of the Red River on both sides produces farm products, grain, livestock, etc., and its inhabitants consume general merchandise and coal. There are no conditions whatsoever that would justify a different *basis* of rates between any community on one side of the river and the only receiving or producing markets which any of the communities, on either side of the river, has, than is accorded to any community opposite to it and on the other side of the river. The value of any article of trade is measured either by

its price at any producing market plus the cost of transportation to the purchaser, or by the price at the receiving market less the cost of transportation to the purchaser. Exhibit 40 Baird, Vol. 10 N. P. Rec., shows that on this basis, if the present interstate rates on commodities shall remain in force, and the state rates prescribed by Chapter 232 shall be installed, hogs are worth 4.6 cents per cwt. more if shipped to South St. Paul from East Grand Forks, Minn., than if shipped from Grand Forks, N. D.; cattle are worth 1.5 cents per cwt. more if shipped to South St. Paul from East Grand Forks, Minn., than if shipped from Grand Forks, N. D.; soft coal is worth 69 cents per ton more if shipped from Duluth, Minn., to Breckenridge, Minn., than if shipped from Superior, Wis., to Breckenridge or from Duluth or Superior to Wahpeton, N. D.; wheat is worth 1.5 cents per cwt., or over a cent a bushel, more (and this difference is more than enough to induce all North Dakota shippers from the valley to ship from the Minnesota side of the river [Complainants' witness Maguire, p. 812, Vol. 3 G. N. Rec.]) if shipped to Duluth, Minn., from Breckenridge, Minn., than if shipped to Duluth from Wahpeton, N. D., or to Superior, Wis., from either Breckenridge or Wahpeton; coarse grain is worth 2.7 cents per cwt. more if shipped from Breckenridge to Duluth than if shipped from Wahpeton to Duluth or from either Wahpeton or Breckenridge to Superior. Under such circumstances, and with only the necessity of hauling or driving, as the case might be, an additional distance of a few miles at most for shipment from the Minnesota station and being accorded the state-made rates than would be necessary for shipment from the North Da-

kota station and being subject to the higher interstate rates, in the case of commodities destined for the eastern Minnesota terminals, or the same necessity in case of commodities or merchandise received from the eastern terminals, could any one doubt, even without evidence, that the North Dakota shipper would invariably avail himself of the Minnesota state rates, and that the railway companies would be wholly deprived of the power to transact interstate business between any of these North Dakota Red River Valley towns and their Minnesota markets or Superior? And could any one doubt that the sole producing cause of the inability of the railroad companies to transact this interstate business would be the reduction of the state rates between the Minnesota border localities and the eastern Minnesota terminals substantially below the basis of the interstate rates between the North Dakota border localities and the eastern Minnesota terminals? In the four years' progress of these suits nobody yet has doubted it as a fact.

> "On the same day that the Northern Pacific Company installed its rates in Minnesota as prescribed by the order, it reduced its interstate rates between Superior and points in Minnesota to an exact parity with its rates between Duluth and other points in Minnesota, its interstate rates between Grand Forks, Fargo, and Wahpeton, N. D., and Minnesota points to an exact parity with its rates between East Grand Forks, Moorhead, and Breckenridge, respectively, and other Minnesota points and its interstate rates between Superior and Grand Forks, Fargo, and Wahpeton, respectively, to an exact parity with its state rates between Duluth and East Grand Forks, Moor-

head, and Breckenridge, respectively. The reduction was substantial. For example, the reduction in the rate on first class from Superior to Fargo was from 65 cents per cwt., to 54.1 cents per cwt., and on fifth class from 27 cents per cwt. to 21.7 per cwt."

(Complainants' witness Baird, pp. 1460-4, 1467, Vol. 4 N. P. Rec.; Complainants' Exhibit 41 Baird introduced at p. 1460, Vol. 4 N. P. Rec.)

"These reductions were compelled by the necessary and direct effect of the operation of the order. Had they not been made, Superior could not have competed in business in Minnesota with Duluth; Fargo, Grand Forks, and Wahpeton could not have competed with Moorhead, East Grand Forks, and Breckenridge, respectively; nor could Superior have transacted business successfully with Fargo, Grand Forks or Wahpeton. Moreover, although the Northern Pacific suffered a substantial loss in revenue from its interstate business, it had the choice of submitting to that loss or of suffering substantial destruction of its interstate commerce in articles covered by the order between these localities."

(Defendant Staples, p. 2646, Vol. 6 N. P. Rec.; Complainants' witness Baird, p. 1455, Vol. 4 N. P. Rec.; Complainants' witness Elliott, p. 1419, Vol. 4 N. P. Rec.; Complainants' witness Maguire, pp. 838-9, Vol. 3 G. N. Rec.)

"On the same day that the Northern Pacific made these reductions in its interstate rates the Great Northern made similar reductions, although its business between Duluth and Minnesota points is interstate. The reason for its reductions from Duluth was to preserve the relation in rates from Duluth which had always existed between localities on the

Great Northern and localities similarly circumstanced on the Northern Pacific, and also to meet the reduced rates on the Northern Pacific line."

(Complainants' witness Maguire, pp. 798-9, 815, Vol. 3 G. N. Rec.).

These are findings of the Court below (p. 395, Vol. 1 N. P. Rec.). There is and can be no question about the fact of the reduction as found; and there is and can be no question that the carriers had, as the only alternative for the necessity of such reduction, the necessity of substantial destruction of their power to transact interstate business between the localities in question.

The evidence so far considered upon the proposition that maintenance simultaneously of their former interstate rates between points in Minnesota and neighboring points in adjacent States, and the much reduced rates prescribed by the state authorities for transportation within the State would necessarily result in destruction of or substantial impairment in volume of the interstate business of the Northern Pacific and Great Northern companies, has been wholly that of opinion given by expert rate-making men of wide experience. There has been no difference of opinion. Indeed, the evidence comprises testimony of witnesses offered by each side. If there were any question of good faith of the witnesses, it surely ought to be removed by the facts set forth in the last foregoing finding. The inability of the railroads to transact interstate business

between Minnesota localities and localities situate adjacent to, but without, the State would have been so certainly a result of such substantial disparity between the basis of the state rates and that of the interstate rates that the officials of the railway companies charged with the duty of making rates did not think it necessary to wait a day for the sake of testing it; but on the very day that the Commission-made merchandise rates were installed pursuant to the Order, they reduced all their interstate rates on merchandise to points near to the Minnesota border line to an exact parity with Minnesota rates up to that line. At the same time, the Northern Pacific reduced its interstate rates from points in Minnesota to all points in North Dakota as far west as Bismarck, N. D. (Complainant's witness Baird p. 1464 Vol. 4 N. P. Rec.) Manifestly, it was compelled to make reductions for some distance westwardly of the Minnesota-North Dakota line. It could not take up all the 20 to 25% reduction in rates from St. Paul to Fargo between Fargo and the next station; so it consumed the distance between Fargo and Bismarck (nearly 200 miles) in getting back to the basis of interstate rates in existence prior to the installation of the rates prescribed by the Order. We do not claim that it was proper for the Northern Pacific to "grade up" to its then existing basis of interstate rates between Fargo and Bismarck—to absorb a difference of 20 to 25% in bases in 200 miles. The only rule of law that would prevent its doing so is that forbidding discrimination, and of that we shall treat in a subsequent chapter of this argument. But it did, whether lawfully or unlawfully, raise the progression of its merchandise rates—its haulage charges for added dis-

tance—rapidly enough so that beyond Bismarck the old basis was reached and maintained.

Nothwithstanding these reductions, the Northern Pacific had not yet safeguarded itself against impairment of volume of its interstate business through the direct and necessary operation of the Order. It is a rule as a practical operating matter of a railroad that a through rate can not exceed the sum of the locals covering the same haul. "It is a rule of necessity for the reason that the shippers can take advantage of the two locals by shipping and reshipping when the sum of the locals is less than the through rate." (Complainants' witness Baird, p. 1478, Vol. 4 N. P. Rec.; Complainants' witness Elliott, pp. 1385, 1404-5, Vol. 4 N. P Rec.)

Even after the reduction by the Northern Pacific of its interstate rates between its eastern terminals and points east of Bismarck, the sum of the locals from the eastern terminals to Fargo (Fargo taking the Commission-made rate to Moorhead) and from Fargo to points westwardly of Bismarck was less than the then existing through interstate rate from the eastern terminals to such points west of Bismarck. It was discovered that a shipper of a carload of nails from Minneapolis destined for Dickinson, N. D. (550 miles from Minneapolis), had taken advantage of this condition, had shipped the nails to Fargo and had reshipped from Fargo to Dickinson. (Baird, as last above.) Thereupon the Northern Pacific reduced in general its interstate rates on merchandise from its eastern terminals in Minnesota, as well as from Superior, to all localities in general in North Dakota to such amounts as should not exceed the sum of the locals to

Moorhead, as prescribed by the Order, and from Moorhead on under the interstate tariff then existing. The finding of Circuit Judge Sanborn upon these facts is as follows:

> "After the installation by the Great Northern and the Northern Pacific companies of the rates prescribed by the order of September 6, 1906, it appeared that the sum of the locals from St. Paul to Moorhead and from Moorhead to many points in North Dakota was less than the theretofore established and maintained interstate rates from St. Paul to these points in North Dakota. Both companies thereupon established and now maintain rates from St. Paul to these North Dakota points as a rule no greater than the sum of the locals on Moorhead, but which are substantially lower in general than the interstate rates maintained by them at the time of the taking effect of the order. Maintaining interstate rates from St. Paul to North Dakota localities substantially greater than the sum of the locals based on the state line would have involved undue and unjust discrimination in fact.
>
> "As a matter of fact, the reasons for such reduction were to prevent trans-shipment at Moorhead in order to take advantage of the lower sum of the locals; to retain on its line traffic which was liable to reach Moorhead over other lines by reason of competition; and, as to less than carload lots, to enable jobbers in the Twin Cities and Duluth to compete with Moorhead and Fargo in territory which otherwise the latter would have exclusively occupied by reason of their closer proximity thereto."
>
> (p. 397, Vol. 1 N. P. Rec.)

It may be that the important menace to the respective traffic men of these companies was that a com-

petitor was able to obtain a part of the revenue from these shipments. It may be that to them there were other important considerations recommending the reduction of the through interstate rates. It is enough in the discussion of this particular topic that if any shipper from the eastern terminals of the Great Northern or the Northern Pacific to any point in North Dakota chose to take advantage of the state-made rates from such eastern terminal to Moorhead and to transship from Moorhead on to the destination of his goods in North Dakota, and so deprive the carrier of the interstate traffic between the eastern terminal and the point of destination of his shipment and of the revenue therefrom, he could do so. (*Gulf Ry. Co. v. Texas*, 204 U. S. 403.) Indeed, ordinarily careful observance of the laws of economy would induce him to do so. And if his ability to do so by virtue of the Order is not enough of a burden upon the interstate commerce of the Northern Pacific to vitiate the Order, is it not enough that the Order permits him not only to deprive the Northern Pacific of its interstate business between its eastern terminals and localities in North Dakota, but as well of the enjoyment of rates and revenue therefrom to which it is entitled under the Constitution and laws of the United States for transportation between two points in separate States? If there is no constitutional objection to a state enactment which, through the operation of sane, economic principles, produces this result, then, of course, North Dakota may establish its local from Fargo on, and a shipper from an eastern terminal of the Northern Pacific to any point in North Dakota need not heed congressional regulation or the rights of the carrier under the

Commerce Clause of the Constitution. The plan is attributed to the respective States of Texas and Oklahoma of establishing on their mutual border line a trans-shipping station so that those shippers carrying on commerce between these two States may ignore federal control of interstate commerce because such commerce may be made local to each State. The project seems to be to subvert federal regulation of interstate commerce by entire destruction of such commerce; and to establish in place of the destroyed interstate commerce, commerce local to the respective States which, it is assumed, may be regulated only by the States. Minnesota and North Dakota seem to have such border trans-shipping stations without necessity of creating them artificially by law.

But the Northern Pacific and Great Northern companies were not yet through with such reductions as were necessary to protect the volume of their interstate business from serious impairment as a necessary effect of the Order. All merchandise rates from all points eastwardly and southwardly of Minnesota to all points in Minnesota on the lines of the Northern Pacific and Great Northern were, prior to the installation of the rates prescribed by the Order, constituted of the sum of the rate from the point of origin to the Twin Cities and the local or state rate from the Twin Cities to the point of destination. (Complainants' witness Maguire, p. 818, Vol. 3 G. N. Rec.) Ordinarily (although the reasonableness of rates *per se* is not to be considered under this topic) a rate consisting of the sum of locals may be the subject of

suspicion with regard to reasonableness. The reason is that every rate, as will hereinafter be shown, is constituted of two terminal charges—the initial and the final—and the haulage charge. So a rate composed of the sum of two rates necessarily comprehends four terminal charges—two for each constituent rate. But a through rate composed of the sum of two rates covering transportation by one trunk line to its terminal and transportation by another trunk line from its terminal is wholly free from objection that it is unreasonable because it comprehends four terminal charges. It in fact has four—the initial and final of the carrier which institutes the transportation, and the initial and final of the carrier which completes it. In the ordinary transportation of merchandise over two trunk lines jointly the initial carrier has to load, switch, etc., at the point of origin of the shipment and switch and unload at the point of transfer to another line, at as great consumption of time and money as if the transportation ended there; and the final carrier is subjected to the same expense as if the transportation began at its terminal; and this is conspicuously true when the transfer is from one large main line to another and the point of transfer is such a large terminal as the Twin Cities compose. In any event, whether reasonable or unreasonable, the lawfully existing interstate rates, lawfully existing under the Constitution and laws of the United States, from all points eastwardly and southwardly of Minnesota to all points in Minnesota, on the lines of the Great Northern or Northern Pacific, were constituted prior to the taking effect of the state rates prescribed by the Commission's Order, of the sum of rates from the point of origin to the

Twin Cities and from the Twin Cities to the point of destination. Upon the installation of the commission-made rates in Minnesota, the Great Northern and Northern Pacific, withdrew all their interstate joint tariffs from all points eastwardly or southwardly of Minnesota to all points on their respective lines in Minnesota and established under the Act to Regulate Commerce new, substantially reduced rates, equal only to the sum of the rates from the point of origin to the Twin Cities and the rates prescribed by the Commission's Order from the Twin Cities to the point of destination. This was necessary because, as a matter of practical railroad operation, no through rate, state or interstate, can be greater than the sum of locals comprising it. (Complainants' witness Baird, p. 1478 Vol. 4, N. P. Rec.) The finding of the Court as to this is as follows:

> "Prior to the taking effect of the order of September 6, 1906, the Great Northern and Northern Pacific companies had established joint through rates in connection with other carriers from all localities easterly or southerly of the state of Minnesota to all points in Minnesota westerly of St. Paul and Minneapolis reached by them, respectively, and these rates were in force at the time of the taking effect of the order. After the rates prescribed by the order were installed, the sum of the locals on St. Paul from all localities southerly and easterly of Minnesota to all localities in Minnesota westerly of St. Paul and Minneapolis reached by these companies was substantially less than the then existing interstate rates between such localities southerly or easterly of Minnesota and such Minnesota localities. Maintaining such a relation of rates would have in-

volved undue and unjust discrimination in fact against the localities easterly and southerly of Minnesota and an unjust and undue preference and advantage in fact for St. Paul, because merchandise could have been shipped from all localities easterly and southerly of Minnesota to St. Paul on the theretofore established and then existing interstate rates and distributed from St. Paul to all points westerly of St. Paul and Minneapolis on the rates prescribed by the order for substantially less charges in the aggregate than would have been incurred for the through haul under the then existing through interstate rates. In order to avoid this discrimination, the companies forthwith, after the taking effect of the order, withdrew the then existing interstate rates, and established a new tariff of through rates which were no higher than the sum of the locals on St. Paul. For example, the former through rates from Chicago to Wadena, Minn., on first-class merchandise, was $1.09 per cwt. The sum of the locals on St. Paul after the taking effect of the order was $1.004. The present through rate is $1.004, being a reduction of 8.6 cents per cwt. In other words, the reduction in the Minnesota rates compelled an unjust discrimination in interstate rates, or submission to the imposition of a substantial burden on interstate commerce."

(Opinion of the Court below, pp. 398-9, Vol. 1, N. P. Rec.

Complainant's Exhibit 44 Maguire, described at pp. 818-20, Vol. 3, G. N. Rec.)

The Court finds that the moving cause of the general reduction in the interstate rates made by the carriers, as set forth in the foregoing finding, was the discrimination that would have otherwise existed, and this is eminently sound and proper. In the same way,

the reduction made by the carriers in all their other interstate rates was induced by the same necessity of avoiding discrimination. The Court does not find that the reductions described in the finding above were made out of the necessity of the carriers brought about by the requirements of the Act to Regulate Commerce, or any rule of the common law; and we are not now considering any such necessity. We are considering only the necessity for reductions in interstate rates in order that, under the operation of the laws and orders complained of, and the most unerring application of economic principles, the carriers could transact interstate business at all, or, at least, without substantial diminution in volume thereof and in revenue derived therefrom. Whether they could have been compelled under the Act to Regulate Commerce to cease the discrimination which would have existed if these reductions had not been made is another question which we shall consider hereinafter; and we shall demonstrate, we think, first, that the discrimination would have been in violation of the Act, and, second that, notwithstanding that fact, the carriers could have practiced it with assurance of immunity from punishment under the Act based upon precedents in that regard, if they had chosen to do so. We are now arguing only the necessary effect of the laws and orders on economic principles and not on legal. If the discrimination between the sum of locals and the through rate is so substantial as to enable a shipper to his own advantage to use the locals instead of the through rate, then, law or no law, the carrier can not as a practical matter of operation enjoy the through rate; and if one of the locals is a state-made

rate which disrupts a long since established and long maintained interstate through rate, then inevitably it follows that the inability of the carrier to enjoy his lawful interstate rate results from the act of the State; and this regardless of whether the Interstate Commerce Act or any rule of the common law is or would be violated by the attempt of the carrier to maintain the higher through interstate rate.

We think it has been fully established that, upon installation by the railway companies of the reduced merchandise rates prescribed by the Order and the Supplemental Order of the Commission, they had no choice excepting between reducing substantially all their interstate rates on merchandise between all points easterly and southerly of Minnesota and localities on their respective lines in Minnesota and between Minnesota localities and localities adjacent to Minnesota in other States, as well as between Superior, Wis., and the North Dakota cities bordering Minnesota, and sustaining destruction of or substantial loss of interstate business, as well as substantial loss of revenue therefrom. No third course was available to them. We think it has been as clearly established that if the railway companies shall install the reduced commodity rates prescribed by Chapter 232, their plight will be the same. Because the commodity rates have never been installed, we have been confined in our demonstration of the necessary and direct result of the operation and effect of the law prescribing them to proof of what must necessarily happen as a result of the instal-

lation of the rates directed by it. And in the matter of the result of the operation and effect of the Order and the Supplemental Order, we have been limited largely to the same character of proof, because at the time of the installation by the companies of the reduced rates prescribed by the respective Orders they made large reductions in their interstate rates without awaiting confirmation by experience of their firm conviction that the interstate business of the companies would suffer serious injury until such reductions should be made.

We come now to consideration of the necessary operation and effect of the act of the legislature of Minnesota, approved April 4, 1907, reducing maximum passenger fares for transportation within the State from three cents per mile to two cents per mile. Fortunately we are not confined in our proof as we have been in the matter of the commodity act, nor even as we have been in the matter of the merchandise orders. The passenger fare act took effect by its terms May 1, 1907, and upon that day the railroads installed the maximum passenger fares prescribed by it. They did not at that time, or, indeed, until some months later, reduce their fares for transportation of passengers interstate touching Minnesota, because the amount of physical work necessary to make the tariff sheets required by the Act to Regulate Commerce to be filed was so great as to prevent it (Complainants' witness Cleland, pp. 1603-4, Vol. 4 N. P. Rec.). The delay furnished the experience and the means of proof of what was the actual, necessary, and direct effect of the operation of the law upon the interstate business of the railroad companies.

The Northern Pacific Company had theretofore maintained a general basis of three cents per mile for passenger transportation not only in Minnesota and interstate touching Minnesota but all over its system (ibid. p. 1601) and this basis had been maintained for some years (ibid 1603).

> "After the maximum rates prescribed by the Act of April 4, 1907, (Chapter 97 Gen. Laws Minn. 1097; Rev. Laws Minn. Supp. 1909, Secs. 2007-1 to 2007-2) were installed, the sum of the locals between Moorhead and other Minnesota points and Moorhead and points westerly thereof was less than the then existing interstate rates between Minnesota points and points westerly thereof.
>
> "The result of this disparity between the through interstate rate over Moorhead and the sum of the locals over Moorhead was this: In the first month after the taking effect of Chapter 97, the revenue for passenger business on the Northern Pacific between Moorhead and other Minnesota points increased 647 per cent over that for the corresponding month of the preceding year, while, eliminating Moorhead business, the revenue for passenger business within the State decreased 2 per cent. In June, 1907, the second month after the taking effect of Chapter 97, there were sold by the Northern Pacific Company 4,037 tickets between St. Paul or Minneapolis, on the one hand, and Moorhead or East Grand Forks on the other, as compared with only 172 such tickets in the corresponding month of the year before; and in June, 1907, there were sold only 173 tickets between St. Paul or Minneapolis on the one hand, and Grand Forks and Fargo on the other, as compared with 984 such tickets in the corresponding month of the year before. In May and June, 1906, only one

> cash fare was collected on a train between Moorhead and St. Paul or Minneapolis. In those months in 1907 there were 1,168 full cash fares and 82 cash half-fares so collected."

(Opinion of the Court below, pp. 404-5, Vol. 1, N. P. Rec.; Complainants' witness Cleland, pp. 1605, 1609-12, Vol. 4 N. P. Rec.; Complainants' Exhibits 49, 50, 51 Cleland, Vol. 10 N. P. Rec.)

There can be only one explanation of this discrepancy in figures:—that the Northern Pacific was being deprived of its power to transact passenger business interstate between Minnesota and points westwardly by the necessary and direct operation of the two cents maximum passenger fare law of Minnesota.

(Complainants' witness Cleland, pp. 1608, 1611, Vol. 4 N. P. Rec.; Defendant Staples, pp. 2899-2900, Vol. 6 N. P. Rec.; Complainants' witness Elliott, p. 1386, Vol. 4 N. P. Rec.)

And the Master and the Court so found.

(Opinion of the Court below, p. 405, Vol. 1, N. P. Rec.)

We do not expect to be met, but perhaps we shall be, with a claim that this result of substantial impairment of the volume of the interstate passenger business of the Northern Pacific was not the direct, but only the indirect, result of the operation of the Minnesota regulation of rates. It certainly was "immediate", which the lexicographers say is a synonym of "direct"; and it certainly happened without the intervention of any other agencies or conditions, which brings it within the scope of the definition of "direct". Moreover, we invite comparison between the facts in these cases and those in the case of *Louisville &*

Nashville R'd. Co. v. Eubank, 184 U. S. 27, in which this Court said (in declaring a provision of the Constitution of Kentucky to be invalid because in conflict with the Commerce Clause of the Constitution of the United States):

> "But the fact which vitiates the provision is that it compels the carrier to regulate, adjust or fix his interstate rates with some reference at least to his rates within the State, thus enabling the State by constitutional provision or by legislation to directly affect, and in that way to regulate, to some extent the interstate commerce of the carrier, which power of regulation the Constitution of the United States gives to the Federal Congress."

It may be claimed that in these cases the carriers were not compelled to fix their interstate rates with reference to the rates within the State—that they could have submitted to the loss of interstate business (which in the Eubank case was inconsiderable, as compared to the loss in these cases [ibid p. 45]); but so could the carrier in the Eubank case. What condemned the constitutional provision in that case was the fact that the carrier was compelled to do one or the other—either forego interstate business or lower its rates within the State as a condition of doing interstate business. The necessary and immediate effect of the operation of the laws and orders complained of in these suits was, as to those which took effect, and will be, if that which has been enjoined shall take effect, to place the carriers subject to them under necessity of lowering their interstate rates as a condition of doing interstate business.

2.

Each law and order complained of is in violation tion of the Commerce Clause of the Constitution of the United States for that through its necessary operation and effect it compels the carriers subject to it to surrender their right under the Constitution and Laws of the United States to transact interstate commerce freely, excepting as regulated by Congress, or to disobey the Act to Regulate Commerce.

The Act to Regulate Commerce (24 Stat. 379 Sec. 3) provides as one of its principal objects (*Int. Com. Com'n. v. B. & O. R. R. Co., supra*) that

> "It shall be unlawful for any common carrier subject to the provisions of this Act * * * to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage whatsoever."

In Section 6 of the Act it is made not only the privilege but the duty of carriers subject to the Act to file with the Commission created by the Act, and to print and keep open for public inspection, schedules showing all the rates, fares and charges for transportation in which it is or may be directly concerned; and, in the same section, all carriers subject to the Act are forbidden to charge or receive a greater compensation for any service than that specified in their respective tariffs filed and in effect at the time Provision is made in the Act for amendments of their schedules by carriers of their own volition (Sec. 6), or by order

of the Commission after hearing upon complaint made, or upon initiative of the Commission (sec. 15).

All the facts considered under the caption preceding this are material to be considered under this caption. It goes without saying that a difference of 20 to 25 per cent in favor of Duluth in rates on merchandise between that city and localities in Minnesota, as compared with rates between Superior and localitics in Minnesota, is an undue and unreasonable prejudice and disadvantage to Superior. The same is true with regard to a similar difference in rates between the western border cities of Minnesota and other localities in Minnesota as compared with rates between the eastern border cities of North Dakota and Minnesota localities, and to a similar difference in rates between Duluth and the western border cities of Minnesota as compared with rates between Superior and the eastern border cities of North Dakota. Indeed, the very reason of the necessary destruction of the interstate business and the growth, at its expense, of business local to Minnesota if the rates for the interstate business in question existing prior to the installation of the commission-made merchandise rates and the commission-made rates had been maintained contemporaneously would have been the extreme severity of the undue and unreasonable prejudice and disadvantage which would have existed against the interstate localities. It has been thought better for a clear understanding of the case, however, to make separate topics in this argument of the proposition that each law and order complained of is void because it necessarily compels the carriers subject to it either to fix their interstate rates with direct reference to the

state-made rates or lose a substantial amount of interstate commerce, and the proposition that each such law and order is void because it compels the carriers subject to it to fix their interstate rates with direct reference to the state-made rates or disobey the provision of the Act to Regulate Commerce forbidding discrimination because, while many facts proved in the cases are material under the application of either of these principles, many others of equal potency are material only, or at least are more plainly material, under the application of the principle treated under this caption. Moreover, the preceding caption had to do most largely with the necessary effect of the laws and orders under the application of ordinary principles of economy; while this has to do with their effect under the application of mandatory rules of law. We sought under the preceding caption to demonstrate that the railroads could not simultaneously maintain their formerly existing interstate rates and their reduced state-made rates because the enterprise and frugality of patrons, and the ordinary laws of economy arising from that enterprise and frugality, would destroy their interstate business; we seek in this chapter to demonstrate that they could not maintain their formerly existing interstate rates or even their interstate rates as reduced by the application of the economic principles considered under the preceding caption simultaneously with their reduced state rates, because the supreme law of the land forbids it.

The Court finds:

> "The conditions attending the transportation of passengers and of freight have been and are

substantially the same for like distances within those portions of the States of Wisconsin, Minnesota, North Dakota, and South Dakota reached by the lines of railway operated by either of these companies, whether such transportation has been or is a business local to a State or interstate between any or all of these States.

"Prior to the orders and acts here in question the fares and rates in force upon these lines of railway for the transportation of passengers and freight were lawful, for they had been adopted in accordance with the provisions of the act of Congress, were relatively fair, and were not discriminatory between interstate business and business local to any State.

"Any substantial change in the basis of rates thus established and in force, or in any particular rate, due only to the fact that the transportation was interstate, or that it was local to a State, would have been actual, undue, and unjust discrimination in fact and any substantial difference in rates for the transportation of passengers, merchandise or commodities maintained by either of said companies as between traffic local to the State and traffic which goes between the State of Minnesota and either of its neighboring States will constitute actual, undue and unjust discrimination in fact."

(pp. 391-2, Vol. 1 N. P. Rec.)

Let us digress here to consider an assignment of error to this Court—being assignment E, as follows:

"The Court erred in holding that conditions affecting interstate and intrastate business were similar and that the rates on the two constitutional classes were relatively fair and equal in the territory comprising Wisconsin, Minnesota, North and South Dakota, before the rates here involved were prescribed, first because

> such finding is immaterial in determining the governmental power of this State, and secondly because such findings are not supported by, but are contrary to, the evidence."
> (pp. 445, Vol. 1 N. P. Rec.)

We do not yet know what that portion of the assignment directed at the insufficiency of the evidence to support the finding means. The evidence is overwhelming and undisputed. (Complainants' witness Baird, pp. 1436-9, 1476-81, Vol. 4 N. P. Rec.; Complainants' witness Maguire, pp. 792-5, 830-4, Vol. 3 G. N. Rec.; Defendant Staples, pp. 2649-50, 2704, 2871, 2883-4, 2891, 2904, 2905, Vol. 6 N. P. Rec.; Complainants' witness Elliott, pp. 1314-15, 1402-3, Vol. 4 N. P. Rec.; Defendants' witness Flinn, pp. 2424, 2511, Vol. 6 N. P. Rec.). So far as we know there is no evidence against the propriety of this finding.

The evidence cited proves without contradiction that the topography of these several States is substantially the same, that the cost of service in any two of them, locally, or between any two of them, interstate, is substantially the same, that the products raised and shipped by the different communities in the several States are of like character, that those several communities receive and consume like articles of commerce, that they have the same receiving and producing terminals, and that no other principal terminals are available to either of them, that in the unanimous opinion of all the experts, on whichever side of the case, everything considered, conditions are the same, and, finally, that for all transportation in the district which they compose, whether the transportation has been local to any of the States or interstate between any two of

them, the carriers have always maintained the same general basis of rates.

We reach the conclusion that the claim that conditions affecting transportation in Wisconsin, the Dakotas, and Minnesota are not the same is predicated upon the fact that the territory in the several States is under different sovereignties.

It does not seem to make any difference, excepting as it leads to clarity of understanding of the effect of the Minnesota rates upon the interstate rates, whether conditions affecting transportation in Minnesota and the Dakotas are similar or dissimilar. If dissimilar, local rates in each State should bear a relation to local rates in the other founded only on the degree of dissimilarity; and interstate rates between any two of them should bear a relation to state rates of each State founded only on the combination of such conditions. Any state which establishes its own rates establishes the conditions, so far as rate-making between two States of which it is one is concerned, which must equally enter into such interstate rate-making with conditions in each other State whose territory is touched in the transportation; and whatever the dissimilarity in actual conditions in two adjacent States, if rates are fixed locally in each State, interstate rates between them can not be fixed without reference to local rates in each of them if discrimination is to be avoided. So that, if that part of the finding of fact which is attacked is untrue, the fact that it is untrue appears not to be vital.

"The whole railroad properties of each of these companies has constituted and still constitutes a single system, and has been and is operated by each of the said companies as such. The cars, engines, and supplies of each company customarily have been and are used upon its system without regard to whether the business in which they have been or are employed has been or is interstate business or business local to a state. Each of said companies customarily has carried and does carry interstate passengers and passengers local to the state on the same train and in the same car, and interstate freight and freight local to a state on the same train, and if less than carload freight in the same car. There has never been any separation, and it is impracticable in the exercise of any fair economy to make and maintain any separation in the business of transporting interstate passengers and passengers local to the state, or between interstate freight and freight local to a state."

(Opinion of the Court below, p. 391, Vol. 1 N. P. Rec.; Complainants' witness Maguire, p. 797, Vol., 3 G. N. Rec.; Complainants' witness Elliott, pp. 1222-6, Vol. 4 N. P. Rec.)

The importance of this finding of the Court and of the evidence which justifies it lies only in the giving emphasis to the degree of discrimination which would be involved against interstate localities, if the railroad companies should maintain their former interstate rates simultaneously with the maintenance of the rates prescribed by the State. It enables us to give point to concrete examples.

A barrel of flour customarily weighs 200 lbs. It belongs to the 4th class of merchandise in the West-

ern Classification upon the basis of which (with amendments made by the Minnesota Commission) the rates in the Order are specified. Moorhead is 239 miles from Minneapolis; Fargo is officially one mile further. Reference to Complainant's Exhibit 41 Baird (Vol. 10 N. P. Rec.) discloses that the former interstate rate from Minneapolis to Fargo on 4th class merchandise was 34 cents per cwt., or 68 cents for a barrel of flour; and that the commission-made rate on 4th class from Minneapolis to Moorhead is 27.1 cents per cwt., or 54.2 cents for a barrel of flour. The Minneapolis-Fargo rate is over 25 per cent greater than the Minneapolis-Moorhead rate. If a consignor should ship at the same time two barrels of flour, one destined to a Moorhead consignee, and the other to a Fargo consignee, they would probably go in the same car. (Complainant's witness Maguire, p. 797, Vol. 3 G. N. Rec.) A charge by the railway company of 25% more for carrying one barrel to Fargo—an added haul of one mile to 239 miles—than for the other barrel to Moorhead, when all conditions (excepting, in any event, the one mile added distance) *must* be the same, *must* be undue and unreasonable discrimination against the Fargo consignee.

From Grand Forks to St. Paul by the Northern Pacific is 329 miles. Grand Forks and East Grand Forks are so close together that the official distance from East Grand Forks to St. Paul is the same as from Grand Forks. Under Chapter 232 prescribing commodity rates cattle are placed in class 14, and the Act provides that a minimum carload shall be 19,000 lbs. Reference to Complainants' Exhibit 40 Baird (Vol. 10 N. P. Rec) discloses that the present rate

on cattle from Grand Forks to St. Paul is 20.5 cents per cwt., or $38.95 per minimum carload; and that the legislative rate proposed from East Grand Forks to St. Paul is 19 cents per cwt. or $36.10 per minimum carload. The interstate rate is 8% greater. Charging 8% more for the freight on a carload of cattle from Grand Forks to St. Paul than from East Grand Forks to St. Paul under conditions so precisely alike as to distance and everything else that nobody so far in these suits has ever suggested a difference excepting that Grand Forks is not claimed to be within the jurisdiction of Minnesota's legislature, and East Grand Forks is, as well *must* be undue and unreasonable discrimination against the Grand Forks rate. (See testimony of Defendant Staples, p. 2810, Vol. 6 N. P. Rec.)

Two passengers board a Northern Pacific train at St. Paul, bound, the one for Moorhead and the other for Fargo. They occupy the same car, and, not improbably, the same seat. Reference to Complainant's Exhibit 52 Cleland (Vol. 10 N. P. Rec.) discloses that under the rate prescribed by the legislature of Minnesota the Moorhead passenger pays $4.90, whereas under the interstate rates existing prior to and at the time of the taking effect of the Minnesota law, and for some months afterward the Fargo passenger paid $7.28. The Fargo passenger, under the formerly existing interstate passenger tariff, would have paid $2.38 more than a passenger traveling under precisely the same conditions, and for an added haul of only one mile to 239. This also unquestionably would have been undue and unreasonable discrimination; and it was such during the maintenance simultaneously of

the former interstate and the reduced state basis of fares.

So it does not need argument, but only a mere statement of the conditions and concrete examples to demonstrate that so far as localities in other States but in close neighborhood to Minnesota were concerned, the installation by the carriers of the rates prescribed by each law and order complained of immediately and directly compelled or would compel (in the case of the enjoined commodity rates) either a fixing of interstate rates touching Minnesota with exact and complete reference to the Minnesota rates, or actual, substantial discrimination against the interstate localities and in favor of the localities within Minnesota. It has been shown fully that the extent of that discrimination would have been with regard to the freight rates, and was with regard to the passenger rates, so great as not only to burden the right which the carriers own under the Constitution of the United States to carry on interstate commerce freely excepting as regulated by Congress, but, indeed, absolutely to destroy their power to exercise that right; and that so far as was necessary to preserve that power they submitted to regulation of their interstate rates touching Minnesota by the laws of Minnesota. But the reductions in their interstate rates on merchandise covered by the order have been only such as to save from complete destruction their power to transact interstate business touching Minnesota and not such as to remedy discrimination against interstate localities; and as a necessary and direct effect of the operation of the order they are even still discriminating not only

against but, as well, in, their interstate business touching Minnesota.

The main line of the Northern Pacific extends from Superior, Wis., and Duluth, Minn., and from St. Paul and Minneapolis, Minn., westerly through the States of Minnesota, North Dakota, Montana, Idaho, Washington, and Oregon, to Seattle, Tacoma, and Portland on the Pacific Coast. On that main line Moorhead, Minn., and Fargo, N. D., are situate together about 240 miles westerly of the Twin Cities; Bismarck, N. D., is situate about 435 miles westerly of the Twin Cities; Billings, Mont., is situate about 890 miles westerly of the Twin Cities; Butte, Mont., is situated about 1120 miles westerly of the Twin Cities. Each of these towns (Moorhead and Fargo being considered, concededly and necessarily, as one locality) is a so-called "jobbing center." Prior to the taking effect of the Order of the Commission fixing merchandise rates in Minnesota they had always been accorded rates by the Northern Pacific Company which would allow them to compete with their nearest neighbors above named in distribution of merchandise. This means, of course, that rates into them from the eastern terminals of the Northern Pacific had been relatively fair, and that their respective distributing rates had been relatively fair when compared with those accorded their nearest neighbors; and that in territory between them or fairly equi-distant from them—geographically tributary to them—Fargo and Moorhead on the one hand, and Bismarck on the other, for example, had been able to engage in fair competition as distributing

points. The immediate, necessary effect of the Order and the Supplemental Order of the Minnesota Commission was to give Moorhead and Fargo a reduction in in-rates from the eastern terminals of 20 to 25% and then, on some articles, of 13½% below that. If the formerly existing relation between Moorhead and Fargo, considered as one point, and Bismarck was reasonable and without discrimination (and nobody denies it), then such very substantial reduction in in-rates to Moorhead and Fargo from the eastern terminals would compel a corresponding reduction from those eastern terminals to Bismarck in order that the reasonable relation might be maintained.

Complainants' Exhibit 41 Baird (Vol. 10 N. P. Rec.) shows that, prior to the taking effect of the Order, the rate on 2nd class merchandise (2nd class being taken merely for illustration) from the Twin Cities (St. Paul and Minneapolis) to Moorhead and Fargo was 57 cents per cwt. Complainants' Exhibit 47 Baird (Vol. 10 N. P. Rec.) shows that prior to the taking effect of the Order the rate on 2nd class from the Twin Cities to Bismarck was 85 cents per cwt. The rate to Bismarck (435 miles from the Twin Cities) was 149% of the rate to Moorhead and Fargo (240 miles from the Twin Cities). The maximum rate on 2nd class, as fixed by the Commission's Order, for 240 miles (Exhibit A to Nor. Pac. Bill of Complaint—p. 16, Vol. 1 N. P. Rec.) is 45.1 cents per cwt. (the fraction of a mill being dropped as prescribed by the Order), and this is the present rate on 2nd class from the Twin Cities to Moorhead and Fargo. (Complainants' Exhibit 41 Baird, Vol. 10 N. P. Rec.) The formerly existing interstate rate from the Twin Cities to Bis-

marck was 188% of the commission-made rate from the Twin Cities to Moorhead and Fargo. The installation of the commission-made rates brought about a change in the relation existing between the rates to Moorhead-Fargo and Bismarck, respectively, from the Twin Cities of 39% of the Fargo rate—to the advantage of Moorhead-Fargo and the disadvantage of Bismarck. These rates under comparison are interstate rates. The formerly existing relation of rates had been established under the Act to Regulate Commerce and had been maintained for years. So far as we are advised, no complaint that it was unfair had ever been made by anybody; and we think that it must be presumed to have been wholly fair. If it was fair, then, of necessity, the new relation created by the direct, necessary operation of the Order must be unfair; and, in view of the difference of 39% of the Fargo rate between the old and the new relation, we think that it is beyond dispute that the unfairness of the new relation is substantial and amounts to unjust discrimination in interstate rates against Bismarck in favor of Fargo.

But let us disregard, for the moment, comparison of the old with the new relation between rates accorded Fargo and Bismarck, respectively, and any reliance, however justifiable, upon the presumption of the reasonableness of the relation established under the Act to Regulate Commerce and so long maintained without complaint. It can be demonstrated by mathematics that, whatever view may be tenable with regard to the reasonableness of the former relation, the new relation is unfair, unreasonable and discriminatory in favor of Fargo and against Bismarck.

The rate of 85 cents per cwt. from the Twin Cities to Bismarck is equivalent to $17.00 per ton. The distance being 435 miles, this rate amounts to 3.9 cents per ton per mile. The rate of 45.1 cents to Fargo amounts to $9.02 per ton. The distance being 240 miles, this rate amounts to 3.75 cents per ton per mile. That is to say, that the average rate per ton per mile for a shorter haul is smaller than the average rate per ton per mile for a longer haul, including the shorter. Defendant Staples says that "the effect of almost any reasonable tariff, constructed upon any plan" would be to decrease the rate per ton per mile for the whole haul as distance increases; and that "a tariff which involves the necessity of violating that principle violates reason". (pp. 2880-82, Vol. 6 N. P. Rec.) See also *Farrar v. East Tenn. V. & G. Ry. Co.*, 1 Int. C. C. Rep. 480.

Mr. Staples in his testimony quoted above was merely stating what anybody who has even a mere smattering knowledge of rate-making knows to be true.

> "Every rate comprehends two terminal charges, the initial and the final, and a distance haulage charge. It is a cardinal principle of rate-making that a rate for a longer distance should be proportionately smaller than one for a shorter distance; that is to say, that a rate for 500 miles should be less than twice the rate for 250 miles, if conditions of transportation be the same, because the rate for 250 miles includes two terminal charges, and, if the rate for 500 miles were twice the rate for 250 miles, it would manifestly include the equivalent of four terminal charges. Even if the haulage charge were the same per mile for a haul of

> 500 miles as for a haul of 250 miles, which is contrary to the rule generally applied in rate-making, the rate per ton per mile for the 500 miles should be less than for the 250 miles because in the one case the terminal charges would be spread over 500 miles and in the other over only 250 miles."

(Opinion of the Court below, p. 396, Vol. 1 N. P. Rec.)

The terminal charges make a fixed factor in every rate. It is manifestly unvarying with the length of the haul. It is the same factor in a rate covering a 15-mile haul as in one covering a 1500-mile haul. The testimony shows that whatever the lengths of the haul the same expense of switching, loading, unloading, way-billing, abstracting, and so on must be incurred. (Complainants' witness Hill, p. 1307, Vol. 3 G. N. Rec.; Complainants' witness Baird, p. 1529-30; Vol. 4 N. P. Rec.).

The schedule of the Commission is framed with this constant factor in each rate in mind. The increase in rates for 1st class, for example, is constant at .98 cent per cwt. for each five miles of added distance between five miles and 200 miles; but the rate for the first five miles is 12 cents per cwt., allowing 11.02 cents for terminal charges. Manifestly the terminal charge is constant for all distances. It is clear that including the terminal factor in figuring the average rate per ton per mile charged for one haul as compared with another produces wholly misleading results. For example, the rate on 1st class for five miles under the Order is 12 cents per cwt., which amounts to $2.40

per ton, or 48 cents per ton per mile; the rate for 10 miles is 12.98 cents per cwt., which amounts to $2.60 per ton or 26 cents per ton per mile. The only justification for this disparity in the two rates upon the basis of the average per ton per mile charge lies in the fact that in the one rate the fixed terminal expense is applied to five miles of haul and in the other to ten. The only proper method, therefore, of comparing two rates for the purpose of determining their reasonableness by relation, is to eliminate from each the fixed factor of the terminal charge and to compare the remainder of the rates—the haulage charge.

Under the schedule comprehended in the Commission's Order, the fixed terminal charge on 2nd class for every distance up to the 500 miles covered by the schedule is 83 1/3% of the fixed terminal charge for 1st class for the same distance, or 9.18 cents per cwt. Eliminating this fixed factor from the Commission's maximum rate on 2nd class from the Twin Cities to Moorhead, it is ascertained that the haulage charge allowed in the rate is 35.92 cents. Eliminating this terminal charge from the Northern Pacific's lawfully established interstate rate from the Twin Cities to Bismarck, it is ascertained that the haulage charge allowed in the rate is 75.82 cents. The haulage charge allowed by the Order to Moorhead (taking effect necessarily to Fargo as well) is at the rate of about three cents per ton per mile; while the haulage charge comprehended in the lawfully established and maintained interstate rate of the Northern Pacific from the Twin Cities to Bismarck is at the rate of 3½ cents per ton per mile. We go into analysis of the component elements of rates in such detail with two pur-

poses:—first, to explain why it is so unerringly true that a relation between rates which discloses a lower rate per ton per mile for a shorter haul than for a longer haul including the shorter is (conditions being similar) necessarily unfair and discriminatory; second, to demonstrate that the actual discrimination in favor of Moorhead and Fargo and against Bismarck, as caused directly and necessarily by the operation of the Order, was substantial in fact, as well as in theory.

We have made the comparison between the Fargo and Bismarck rates on the basis of the present Fargo rates as established by the Order to Moorhead and the formerly existing Bismarck rates. Since the installation of the commission-made rates to Moorhead the Northern Pacific has mitigated to some extent the severity of the discrimination which would have been created by the simultaneous maintenance of the state rates to Moorhead and the former interstate rates to localities beyond Moorhead by substantial reductions in its interstate rates; and, in so doing, has reduced the Twin Cities-Bismarck rate on 2nd class from 85 cents per cwt. to 82 cents per cwt. The same method of calculation will disclose, however, that, although in some lesser degree, the relation now existing is unfair against Bismarck.

So that it is demonstrable that the present relation between the two interstate rates—the one from the Twin Cities to Fargo, and the other from the Twin Cities to Bismarck—is discriminatory. The same method of demonstration would show like discrimination in favor of Moorhead and against practically all localities in North Dakota and Montana. (Complainants' Exhibit 46 Baird, Vol. 10 N. P. Rec. Complain-

ants' witness Baird, pp. 1491-2 Vol. 4, N. P. Rec.) There are only two methods of curing this discrimination. One is through the reduction by the Northern Pacific of its interstate rate from the Twin Cities to Bismarck to such extent as will place Bismarck in fair relation with Fargo, and the other is by raising its interstate rate to Fargo to such extent as will place Fargo in fair relation with Bismarck, even though this course shall necessarily result, for the protection of its interstate business with Fargo, in raising its state rates from the Twin Cities to Moorhead and intermediate points. The pursuit of the latter course will allow vitality to the Commerce Clause of the Constitution; the pursuit of the former course will destroy the vitality of the Commerce Clause of the Constitution; the pursuit of neither course, if that is permissible under the law, will involve actual, if not unlawful, disobedience of the provisions of the Act to Regulate Commerce forbidding discrimination.

Let us digress here again. We have spent considerable effort heretofore in this argument in an endeavor to demonstrate that the proviso in the first section of the Act to Regulate Commerce should not be construed as limiting the prohibition of discrimination against any locality, contained in the body of the Act, to discrimination existing as between two interstate rates only; but should be construed broadly enough to prohibit discrimination against a locality in one State in favor of a locality in another State, whether such discrimination should result through the voluntary ac-

tion of a carrier or through the action of the State in which the favored locality should be situate. It seems now that it makes no difference whichever construction is placed upon the proviso.

The situation is this: The necessary and immediate effect of the operation of each law and order complained of has been, as to those which have been put into operation, and will be, as to that which has not been put into operation, if it shall go into operation, to compel the carriers subject to it to reduce their interstate rates between all localities in Minnesota and border localities in North Dakota and Wisconsin to a substantial parity with the rates prescribed within the State of Minnesota, or submit to destruction of their interstate business between localities in Minnesota and border localities in Wisconsin and border localities in North Dakota, as well as their interstate business between border localities in Wisconsin and border localities in North Dakota. Having made such reductions in their interstate rates as were necessary to protect their power to do interstate business, their interstate rates from localities in Minnesota to border localities in North Dakota are thrown wholly out of proper relation with their interstate rates between such localities in Minnesota and other localities in North Dakota. And their interstate rates from Superior to border localities in Minnesota on the western boundary are placed wholly out of proper, just or fair relation with their interstate rates from Superior to localities in North Dakota. The question is: Can the railroads maintain this new and unfair relation between two interstate rates as against complaint made under the Act to Regulate Commerce? Could they

have done it of their own volition? Let us consider a very simple example for illustration. Casselton, N. D., is about 20 miles westerly of Moorhead. The former rate on 1st class merchandise from Superior to Moorhead was 67 cents per cwt., and from Superior to Casselton was 71 cents per cwt., an addition of four cents to the Moorhead rate for the added haul of approximately twenty miles to the 250 miles between Superior and Moorhead. The Order caused a reduction in the Superior-Moorhead rate to 55.1 cents per cwt. on 1st class. Could the railroad company have maintained its rate of 71 cents to Casselton simultaneously with its reduced rate to Moorhead? The difference in the rates for an added haul of 20 miles would have been 15.9 cents. The relation between the rates would have been clear discrimination in favor of Moorhead and against Casselton. For a like added haul—20 miles to 250—the Order itself allows an addition to the rate of only 1.96 cent, anywhere in the State of Minnesota, whether on main lines or branches. (For rates cited, see Complainants' Exhibits 41 and 47 Baird, Vol. 10 N. P. Rec.)

The rates compared in this illustration are both interstate rates, one for transportation originating without and terminating within the State of Minnesota and the other for transportation originating without and terminating without the State of Minnesota. Can anybody deny that under the Act to Regulate Commerce the Interstate Commerce Commission, upon complaint made by Casselton, would have jurisdiction over the matter and power to forbid and prevent this discrimination?

To the efficient traffic manager of a railway company nothing is more intolerable than discrimination in rates as between localities on its line, a disparity in rates not justified by conditions, and therefore an unfair relation. To convince that this is true, we cite the testimony of complainant's witness Baird to be found at pp. 2187, *et seq.*, Vol. 5 N. P. Rec. The reduction in rates between the eastern terminals of the Northern Pacific and Moorhead under the Order was great. The Northern Pacific could not take up all this difference in the new basis as compared with the old between Moorhead and Casselton, a distance of 20 miles, without substantial discrimination to such extent as would extinguish Casselton. Therefore, it took up the difference by absorption little by little, station by station, over a distance (varying with the classes of merchandise) from about 200 miles west of Moorhead to 375 miles west of Moorhead. In fact the reduction of interstate merchandise rates between the eastern terminals of the Company and all localities in North Dakota has been general; and it has not yet been made, and has never been claimed to have been made, to such extent as to cure discrimination against North Dakota localities in favor of Minnesota localities, (Complainants' witness Baird, pp. 1522-7, Vol. 4 N. P. Rec.; Complainants' witness Maguire, pp. 842, 870, Vol. 3 G. N. Rec.; Complainants' witness Elliott, pp. 1382-3, Vol. 4 N. P. Rec.); but only to such extent as was necessary to protect the company against destruction of its interstate business.

Criticism of this general reduction based upon the lack of necessity for it, is made by the defendants below (the militant defendants). They produce the

expert rate clerk of the Commission and he produces an exhibit (Defendants' Exhibit 3-B Flinn, Vol. 9 N. P. Rec.) by which he means to show that the traffic manager of the Northern Pacific, charged with making rates, could have made a new schedule for interstate rates into North Dakota from the eastern terminals of the line, after the installation of the reduced rates to Moorhead, such that the former basis of interstate rates could have been coalesced with at Buffalo, N. D., 37 miles westwardly of Moorhead. In this exhibit and in his testimony supporting it (p. 2418, Vol. 5 N. P. Rec.) he assumes, as everybody who testifies in these suits does, that Fargo must have the same rates as Moorhead—for example 54.1 cents per cwt. on 1st class merchandise. He suggests raising this rate between Fargo and Casselton to 66 cents per cwt. In other words, he declares that the addition made by the Northern Pacific in its new rate to Casselton, of 5.9 cents, to its commission-made rate to Moorhead was unnecessarily small; and that it might have added 11.9 cents for the 20 miles of additional haul beyond Fargo, and thus in a measure have protected its revenue, notwithstanding that 1st class merchandise covered by the rate has, for the 20 miles easterly of Fargo, been hauled for 1.96 cents under the schedule prescribed by the Commission's Order; and the only difference in conditions between the two stretches of 20 miles is that one is in Minnesota and the other is in North Dakota. Mr. Flinn does not testify that his proposed schedule would prevent discrimination. In fact he declares that it would establish it (pp. 2423-4, Vol. 6 N. P. Rec.); and, therefore, we need say nothing more about the only attack made

upon the necessity of the general reductions in its interstate rates between Minnesota and North Dakota made by the Northern Pacific with serious damage to revenue but in order to protect its interstate business only and not in order to remedy the discrimination against its interstate rates between Minnesota and North Dakota which must exist unless still further general reductions shall be made.

Let us resume consideration of the condition in relation to each other of the various distributing centers along the line of the Northern Pacific under the necessary operation and effect of the laws and orders complained of, under this caption that each such law and order compels the carriers subject to it either to fix their rates with direct reference to the state-made rates or to discriminate against localities in violation of the Supreme Law of the Land. We have shown that Bismarck will be unfairly and unjustly treated in the matter of interstate rates from the eastern terminals of the Northern Pacific as compared with Fargo unless its rates to and from those terminals be reduced proportionately with the reductions to Fargo caused by the necessary result of the Order. But if the rates interstate from the eastern terminals to Bismarck shall be reduced to such extent as shall cure the otherwise necessarily created and existing discrimination in rates as between Fargo and Bismarck, what of the relation between Bismarck and Billings and between Billings and Butte, and, indeed, between Fargo and Moorhead and Butte, Fargo and Moorhead and Billings, and Bismarck and Butte?

Billings, prior to the taking effect of the rates specified in the Orders, had a fair relation of rates not only with Fargo but as well with Bismarck and Butte. Butte, prior to the taking effect of the Orders, had a fair relation of rates with Fargo, Bismarck and Billings. Substantial reduction of rates from the merchandise terminals of Minnesota to Fargo destroyed this fair relation not only between Fargo and Bismarck, disastrously to Bismarck, but as well, and only in less extent, between Fargo and Billings, and Fargo and Butte. If the discrimination caused by the simultaneous maintenance of the reduced rates from the eastern merchandise distributing terminals to Fargo and the established interstate rates to Bismarck be removed by a proportionate reduction in rates from those terminals to Bismarck the same discrimination will result as between Bismarck and Billings and Bismarck and Butte; if that discrimination be removed by corresponding reduction in rates to Billings, the same discrimination will result as between Billings and Butte; if that discrimination be removed, the entire rate fabric of the United States westerly of the Mississippi will be destroyed. We need not go particularly into the facts. We think it sufficient to quote the finding of fact of Circuit Judge Sanborn and to cite the testimony upon which it was considered to be justified.

> "Moorhead, Minn., Fargo and Bismarck, N. D., Billings and Butte, Mont., are so-called 'jobbing centers'. Prior to the taking effect of the order of September 6, 1906, they had always been accorded rates by the Northern

Pacific Company which would allow them to compete in distribution of merchandise with their nearest neighbors and with St. Paul and Minneapolis and Duluth. The sum of carload rates from St. Paul, Minneapolis, and Duluth to these centers and the less than carload rates out from these centers to the territory geographically tributary to them, respectively, had been such as to compare favorably with rates in and out of their local competitors as well as with less than carload rates from St. Paul, Minneapolis, and Duluth into the territory geographically served by them, respectively. The order of September 6, 1906, as supplemented by the order of May 3, 1907, substantially reduced carload rates from Duluth, St. Paul and Minneapolis to Moorhead. This reduction would have given Moorhead a substantial advantage in territory accessible to its jobbing industry, not only as against Fargo, unless carload rates to Fargo should have been similarly reduced, but also as against Duluth, St. Paul and Minneapolis, unless less than carload rates from these points to points geographically accessible to Moorhead, which included a considerable territory in North Dakota, should have been proportionately reduced. This reduction, unless accompanied by a corresponding reduction in carload rates to Fargo from the eastern terminals, would have served to build up Moorhead at the expense of Fargo, and therefore to discriminate unduly and unjustly against Fargo as a matter of fact, and would destroy the relation in rates which had theretofore existed between the sum of carload rates into Moorhead and less than carload distributing rates out on the one hand, and less than carload distributing rates from Duluth, St. Paul and Minneapolis to localities accessible to Moorhead on the other. If Fargo were protected as against Moorhead by a like reduction in carload rates, it would have an advantage

and preference over Bismarck in territory common to them both and an advantage over the eastern terminals in territory common to Fargo and them, unless carload rates from the eastern terminals to Bismarck and less than carload rates from the eastern terminals to the territory accessible to Fargo should be correspondingly reduced; and this advantage would constitute an undue and unjust preference to Fargo as against Bismarck, which competes in certain territory with Fargo, unless rates on carload lots from the eastern terminals to Bismarck should be correspondingly reduced. And so on, from distributing point to distributing point.

* * * * * *

"For more than 25 years the Northern Pacific Company has maintained an equal basis of rates on merchandise between its eastern terminals and Butte and its western terminals and Butte, and between its eastern terminals and localities intermediate between them and Butte, and between its western terminals and localities intermediate between them and Butte. Other railroads reaching Butte have, during the same time, maintained like rates to Butte from Sioux City, Omaha, St. Joseph, and Kansas City on the east, and from San Francisco, Sacramento and Los Angeles on the west. Butte has been as the hub of the wheel, with spokes representing equal rates to these various cities. Industries have been born and have grown in reliance upon this parity of rates. Intermediate points have had rates fixed in proportion with the Butte rates. Competition of markets and of carriers has brought this about. The Northern Pacific Company cannot maintain its present commission-made rates between its eastern terminals and Moorhead, and at the same time its present interstate rates from its eastern terminals to Butte without substantial discrimination in fact

against Butte or localities intermediate between its eastern terminals and Butte. If it lowers its rates from its eastern terminals to Butte and intermediate stations to such an extent as to obviate substantial discrimination in fact, it must, to preserve the relation which has always existed, lower to a like extent its rates from its western terminals to Butte and intermediate stations. If, then, the Northern Pacific maintains the commission-made rates between its eastern terminals and Moorhead, it must either substantially discriminate in fact or destroy the general relation of rates which has existed for many years in the territory between the Missouri river and the Pacific Coast. In this way the reduction of the rates in Minnesota either imposes a substantial burden upon, and a regulation of, interstate commerce or compels unjust discrimination therein."

(Opinion of Judge Sanborn, pp. 395, 398, Vol. 1 N. P. Rec.; Complainants' witness Baird, pp. 1467-8, 1528, Vol. 4 N. P. Rec.; Complainants' Exhibit 48 Baird, Vol. 10 N. P. Rec.; Defendants' witness Flinn, p. 2503, Vol. 6, N. P. Rec.; Complainants' witness Elliott, pp. 1320-1, 1382, 1403, Vol. 4 N. P. Rec.).

There is covered by the findings of fact quoted and by some of the testimony cited the fact that Bismarck, Billings, and Butte are not the only localities to be borne in mind in the consideration of this question of discrimination; but that rates to all intermediate points, as well as rates between intermediate points, should be entitled to consideration also in the way of readjustment to prevent discrimination.

Rates between terminal points can not, without discrimination, be wholly out of step in relation with rates

from either terminal point to any intermediate point, or with rates between any two intermediate points, whether such intermediate points be in the same State or in different States.

We have dealt so far with only the most obvious discrimination that would have resulted from the maintenance simultaneously by the carriers of the rates directed to be maintained by the laws and orders complained of and the basis of interstate rates for transportation touching Minnesota in existence when the respective laws and orders became effective. There are, however, other discriminations in rates, which still exist as a necessary consequence of the orders complained of, which have gone into effect, and which can not be so easily cured as those heretofore called to attention.

The Commission's Order does not merely prescribe rates; it prescribes an unalterable, unvarying system of building rates for all distances within Minnesota up to 500 miles. The instructions from the legislature under which the Commission acted were "to undertake the work of securing a readjustment of the existing freight rates in this State which will give a more uniform system of rates throughout the State and a uniform scale of percentages which each class rate shall bear to the 1st class, the readjustment to secure a substantial reduction in the existing merchandise rates." (Defendant Staples, pp. 2622, 2632, Vol. 6 N. P. Rec.) The Order made by the Commission under these instructions comprehends a schedule framed on the following plan: For 1st class merchandise an allowance

of 11.02 cents per cwt. is allowed for a terminal charge, which is included in every rate whatever the distance. For each five miles or fraction thereof of distance up to 200 miles .98 cent is allowed for a haulage charge; after the distance of 200 miles is reached .98 cent is allowed for each ten miles or fraction thereof of further distance up to 400 miles; after the distance of 400 miles is reached .98 cent is allowed for each twenty miles or fraction thereof of further distance up to 500 miles. Rates for the other classes are a fixed percentum of those of the 1st class, those for 2nd class being 83 1/3%; of the 3rd class being 66 2/3%; of the 4th class being 50%; of the 5th class being 40%; of Class A being 45%; of Class B being 35%; of Class C being 30%; of Class D being 25%; and of Class E being 20%. One who knows the plan of the schedule and who has before him the Western Classification with the changes in it made by the Minnesota Commission can, then, if given the rate for one distance on any article of merchandise, ascertain by calculation the schedule rate on any other article of merchandise for any other distance. For example, given the rate on 1st class for 150 miles as 40.42 cents and wishing to ascertain the rate on 3rd class for 260 miles, add to the rate of 40.42 on 1st class for 150 miles .98 cent for each five miles additional to 150 miles up to 200 miles, and for each ten miles further up to 260 miles, making 56.10 cents per cwt. for 1st class at that distance. The rate on 3rd class is simply 66 2/3% of that amount, or 37.40 cents per cwt. The Order forbids the railways any higher rate than that prescribed in the schedule, and provides that, although it does not prevent the charging of a lower rate than is prescribed

by the schedule, "in case a less rate is charged on one class, all classes must be reduced so as to preserve the relative relations between classes fixed in" the schedule. (Exhibit 1 to Bill of Complaint, pp. 12-17, Vol. 1 N. P. Rec.) Moreover, the Minnesota Commission is extremely vigilant in exercising and protecting its power to determine the classification, the relation between different descriptions of traffic, which the carriers shall use as the basis of their rates. Mr. Staples, on behalf of the Commission, declares (p. 2825, Vol. 6 N. P. Rec.) that the power to make classifications is as important as the power to make rates inasmuch as if the carriers should be left free to make their own classification they could discriminate as freely as they could with free power to make rates. The Minnesota Commission has made 242 changes in the Western Classification, the result of each change being to drop the article of merchandise affected into a less remunerative class (Complainants' witness Maguire, p. 898, Vol. 3 G. N. Rec.); but the carriers are not at liberty to make any such changes or to have any discretion in the way of classification for traffic local to Minnesota. None of them may reduce a rate on any article of merchandise below the rate by it maintained for the class to which that article belongs, as regulated by the State, unless the rate upon the entire class is reduced; and if that is done, then, mechanically, by the operation of the Order, all other rates for all other classes are reduced in like proportion (Defendant Staples, p. 2816, Vol. 6 N. P. Rec.)

By the Act to Regulate Commerce (Sec. 6) the schedules of rates required to be filed and kept open to public inspection by carriers shall "contain the classi-

fication of freight in force" and this classification is subject to all the provisions of the Act with regard to amendments at the will of the carrier and under order of the Commission to which rates are subject. We do not say that under the Act carriers are compelled to classify their traffic. We do say that they have the right to do so (Int. Com. Com'n. v. C. G. W. Ry. Co., *supra*); that if they do classify they must include their classification in their schedules; that whether or not they shall choose to classify the Commission has power to classify for them or amend their classification, as the case may be; and that in the practical exercise of the power of regulation with a design of preventing discrimination between articles of traffic or parties the Commission should be, has been and is, vigilant in the exercise of that power. Classification must, from its nature, be a mere matter of discretion. Many factors are considered in deciding it. The amount of traffic in the article which is the immediate subject of classification, its value, the space occupied by it in comparison with its weight, the convenience of loading and other considerations are properly to be borne in mind in making it. So, indeed, are they all to be borne in mind in rate-making; but whereas the reasonableness of a rate *per se* is to be determined on the base, theoretically at least, of the cost and value of service, proper classification is to be determined on the relation of rates which different articles ought to endure in comparison with each other, and is not a matter of even theoretical exactness. It is a matter within broad confines of discretion of the one with power to make it, whether the carrier, in the first instance, or the controlling sovereignty, state or federal. A carrier is

not expected under the law to derive equally remunerative rates on all business; and regulation is by no means confined to the requirement that rates must be fixed on the basis that it shall. It should not be necessary to cite authorities in support of this proposition. Suffice it to cite the testimony of Defendant Staples in the matter of the confessedly low rate on soft coal prescribed by Chapter 232. (pp. 2706, *et seq.*, Vol. 6, N. P. Rec.) The purport of his testimony is that the difference in classification between hard coal and soft coal in the operation of which soft coal takes a much lower rate than hard coal, although the difference in the cost of the service is immaterial, rests on the consideration that soft coal is a necessity and hard coal more in the nature of a luxury with the people of Minnesota; that is to say that it rests on the mere discretion of the legislature. And, within limits, we do not quarrel with his view that the exercise of the power of classification is not to be controlled by any exact determination as to whether it is justifiable. The aim of proper classification is to ensure fair treatment as between shippers and as between consumers of different commodities. For example, if rye and wheat, being somewhat competitive, or under all the circumstances worthy of consideration to be transported for like compensation they should be in the same class; and, if transportation of wheat should be charged for at a higher figure than that of rye, forthwith discrimination would result against the traffic in wheat and against the shipper and consumer of wheat. But the object of classification would be defeated if there were too many classes. In the Official Classification there are only six classes; in the Western there are only

ten. Clearly the determination of classification involves the exercise of expert judgment, and equally experienced and intelligent experts ought not to be expected always to agree. Therefore, as is the rule concerning classification in any other subjects of legislation, the Court ought not to review the classification of freight made by proper authority "unless palpably arbitrary." *Orient Ins. Co. v. Daggs*, 172 U. S. at p. 562. (See *C. H. & D. Ry. Co v. Int. Com. Com'n.*, 206 U. S. 142.)

But other States claim the right to classify and exercise it. (Complainants' witness Maguire, pp. 898-9, Vol. 3 G. N. Rec.) Iowa prescribes a classification of its own. Montana uses the so-called "Old Western Classification." North and South Dakota, as well as the Interstate Commerce Commission, are apparently satisfied with the Western Classification with such changes as they respectively shall make, although they make different changes (Maguire, as last above.). If the States have power to classify at all, it is a general power; and, because classification is only the exercise of discretion as to what relation of rates shall apply as between any two articles, the exercise of the power by one properly vested with it can not be practically, if at all, controlled.

Let us suppose that Minnesota shall make a general schedule of rates based upon a classification of its own; North Dakota shall make a general schedule based on a classification of its own; the Interstate Commerce Commission shall make a general schedule of rates for commerce between these States based upon a classification of its own. Each schedule

taken as a whole may be safe against attack on the ground that it does not afford a reasonable return to the carriers. No court may have jurisdiction over all three or (if the State schedules are valid) can declare any one insufficient because any other one prevents its sufficiency. The attempt by the carriers to maintain all three would result in universal discrimination even if, under the inexorable rule that the interstate rate can not be realized if greater than the sum of the locals, the interstate schedule could be maintained at all.

The record contains only one illustrative example although it might have contained very many (Complainants' witness Maguire, pp. 899-90, Vol. 3, G. N. Rec.) The Western Classification makes refined oil in barrels 3rd class; the Minnesota Commission reduced it to 4th class, and Iowa, North and South Dakota took the same action. The Great Northern succumbed to the inevitable and reduced it to 4th class for its traffic interstate between these States. Some other carriers did not do so, and application was made to the Interstate Commerce Commission to reduce it generally for traffic between these States to 4th class. The record shows that the complaint was dismissed; but we are advised that, on a subsequent application, the Interstate Commerce Commission also reduced it to 4th class. If it had not done so it would have submitted, in this case, to discrimination against interstate traffic between these States in favor of local traffic in each State carried on over the same rails, on the same train and in the same car. (Complainants' witness Maguire, p. 797, Vol. 3, G. N. Rec.).

In consideration of Chapter 232, the Commodities Act, the same argument applies as has been applied

hereinabove to the Order, with regard to the stability of the relation of the members of the respective groups of commodities covered by it; and the same conclusions therefrom are properly to be drawn. (Defendant Staples, pp. 2823-4, Vol. 6, N. P. Rec.).

By Chapter 232 the legislature assumed to classify all the commodities covered by the Act. The classification is substantially different to that now maintained by the railway companies. For example, Complainants' Exhibit 43, Baird (Vol. 10, N. P. Rec.) discloses that the present rates maintained by the Northern Pacific on lumber and laths are different—that those articles are not now in the same class. In the still pending lumber rate case the Interstate Commerce Commission has prescribed different rates for them. (Complainants' witness Baird, pp. 1484-6, Vol. 4, N. P. Rec.). Chapter 232 places them, as well as, strangely enough, doors and blinds, in the same class. Complainants' Exhibit 44, Baird (Vol. 10, N. P. Rec.) shows that at present the Northern Pacific classifies wheat, corn, oats, rye and barley together. Chapter 232 places wheat in Class 11 and the other grain in Class 12, and prescribes different rates for the classes. It seems easy enough, as a practical matter of operation, and if they shall be regardless of revenue, for the Northern Pacific and Great Northern to reduce their interstate rates on wheat, corn, oats, rye and barley to the basis of the legislative schedule and so prevent discrimination against interstate localities in favor of localities within Minnesota. The Interstate Commerce Commision probably would not object to that if the reduction were ratably equal as between different commodities. But when it comes

to changing their classification in their interstate traffic so that it shall conform to the legislative classification, and this, of course, will be necessary, in order to reduce their interstate rates to the basis of the legislative rates and prevent discrimination against interstate localities—when it comes to changing their interstate schedules in such manner as to compel the shipper of wheat to pay for transportation to the eastern terminals substantially more than the shipper of rye or barley is called upon to pay, to altering materially the long maintained relation between rates for the interstate transportation of wheat and those for rye and barley, and therefore to changing the long established relation between different descriptions of traffic, we can not see how we can predict what the Interstate Commerce Commission would do. The Act to Regulate Commerce forbids as positively discrimination between particular descriptions of traffic as that between different persons or different localities. (24 Stat. 379, § 3). If the Commission were satisfied with the present classification made by the railways and were of opinion that it was wholly fair as between the shipper of wheat and the shipper of rye or barley, it would have to choose between permitting discrimination against interstate localities and discrimination between subjects of interstate traffic and therefore between interstate shippers. If the present relation in rates between different classes of traffic is fair as applied by the railroads to interstate traffic, then the operation of Chapter 232 will necessarily be to compel the railroads to change that relation and discriminate against certain descriptions of traffic or to discriminate against interstate localities; and in

either case to disobey the Act to Regulate Commerce. We can conceive of no available third course to be followed.

We have hereinabove cited the testimony of defendant Staples in support of the proposition that the Commission claims, and will exercise stringently, the power to prevent carriers subject to the laws and orders under consideration from departing from the respective classifications in them established. (pp. 2823-4, Vol. 6, N. P. Rec.). The record discloses a colloquy between counsel over the admissibility of this testimony, because it was claimed to involve a question of law rather than one of fact. The Master allowed the testimony, as he was bound to do. We hope that it is now obvious that it would have been of no importance if the testimony had not appeared in the record. If the legislature or the Commission as its agent has power to establish classification, it has power to enforce its strict maintenance. And we need not have substantiated their intention to maintain it. The entire question is one of power (*L. & N. R'd Co. v. Eubank,* 184 U. S. 27); and the power to establish a classification is equally, no more or no less, in violation of the Commerce Clause of the Constitution of the United States, with the power to maintain an established classification, provided the establishing or maintaining, as the case may be, results by its necessary operation and effect in destroying the privileges which carriers are vouchsafed under the Act to Regulate Commerce or compels them to set at naught the prohibitions of that Act.

"The Great Northern Company operates a line from St. Paul to Sioux City, Iowa, 327 miles from St. Paul, which leaves the State of Minnesota and enters the State of South Dakota at a distance approximtely 218 miles from St. Paul—the distance from St. Paul to Jasper, the border Minnesota town.

It operates another line from St. Paul to Huron, S. D., 294 miles from St. Paul, which leaves the State of Minnesota and enters the State of South Dakota at a distance approximately 173 miles from St. Paul—the distance from St. Paul to Nassau, the border Minnesota town. Between St. Paul and Willmar, Minn., 102 miles from St. Paul, these lines are identical.

Under the schedule prescribed in the order, the progression of the rate—the haulage charge with increasing distance—breaks in two at a distance of 200 miles. That is to say, the haulage charge for first class (and for other classes in fixed relation) having been allowed at .98 cent for each five miles up to 200 miles is cut to .98 cent for each 10 miles beyond 200 miles, and up to 400 miles.

When the line between Minnesota and South Dakota is reached on the St. Paul-Sioux City line, the progression of the rate prescribed by the schedule is .98 cent per 10 miles for first class.

When the line between Minnesota and South Dakota is reached on the St. Paul-Huron line, the progression of the rate is .98 cent per five miles of haul.

It is apparent that, unless undue and unjust discrimination shall exist in the rates on one of these interstate lines as compared with the other, the same basis of making the rate, the same relation between rates for different distances and different classes must be maintained on one line as on the other, and that, notwith-

standing that the 200-mile point of distance on the St. Paul-Huron line is within the State of South Dakota, the progression of the rate should break in two as it has on the St. Paul-Sioux City line on which that point was reached, and that break was made within the State of Minnesota.

The schedule prescribes fixed relations between rates for different distances and different classes. If the relation must be adhered to within the State of Minnesota, it cannot be departed from substantially merely because of the intervention of a state line at one distance or another without involving undue and unjust discrimination in fact in rates."

(Opinion of the Court below, pp. 400-1, Vol. 1 N. P. Rec.; Complainants' witness Maguire, pp. 790-6, Vol. 3 G. N. Rec.; Complainants' Exhibit 39 Maguire, Vol. 6 G. N. Rec.)

(See Map 2, supra.)

In connection with the facts found above, as with all other facts involving the principle, it should be borne in mind that the existence of discrimination is to be determined by comparison of rates involved, one with the other, with regard to their relative fairness. In consideration of the matter of discrimination between two rates, the question of the reasonableness of either rate is not involved excepting by relation between them. In commerce everybody desires merely to have fair opportunity in competition. (Complainant's witness Maguire, p. 809, Vol. 3, G. N. Rec.) Within ordinary limits, the matter of reasonableness, unless discrimination either between localities or between shippers or between different articles of

traffic is under consideration, is not important unless with a view to the entire return to the carrier from its entire schedule. Here, however, we are discussing the fact of discrimination which must inevitably result from the operation of the laws and orders complained of, with only the alternative that the carriers shall remove that discrimination by regulating their interstate rates in immediate consonance with their state rates. If the Great Northern shall observe fairly and equitably the similarity of conditions that exists on its St. Paul-Huron line and on its St. Paul-Sioux City line, above described (Complainants' witness Maguire, 790-6, Vol. 3, G. N. Rec.) it must maintain the same basis of rates on both, under the operation of the Order. Let us take, for example, the rates to a locality in South Dakota on the St. Paul-Huron line, 218 miles from St. Paul. What are its reasonable rates?

The rates from St. Paul to Jasper, Minn., which is at the same distance from St. Paul but on the St. Paul-Sioux City line, are fixed by the State of Minnesota and are low. They are not only fixed but are fixed in certain unvarying relation each to the other when different descriptions of traffic are in comparison. For nearly half the distance to Jasper the traffic is over the same rails with traffic to the point of equal distance on the St. Paul-Huron line; and, when there is a departure from that line, there is no change in conditions excepting as made by the different points of the compass. The relation between the rates from St. Paul to Willmar, the junction point of separation of the two lines, 102 miles from St. Paul, and those from St. Paul to Jasper as prescribed by the

Order, is fair, as a matter of course. They are each a part of a carefully devised scheme to make all rates within the State fair by relation. How can the relation of rates between St. Paul and Willmar and rates between St. Paul and a point in South Dakota on the St. Paul-Huron line equi-distant from St. Paul with Jasper be equally fair unless the South Dakota locality on the St. Paul-Huron line, notwithstanding that it is in South Dakota, shall have the same rates from St. Paul as has Jasper, Minn? And if its rates as compared with the junction point are not fairly related with those of Jasper, its rates from St. Paul evidently can not be. The only escape from discrimination in rates on these two lines, resting only on the distance within the State of Minnesota covered by them respectively, lies in the application of the entire Minnesota schedule to each, for interstate as well as state traffic; and regardless of what mileage of each line is within the State of Minnesota.

Again, the Interstate Commerce Commission has, after hearing, fixed the reasonable rate on 1st class merchandise between Duluth and Sioux Falls, South Dakota, at 80 cents per cwt. (Complainants' witness Maguire, pp. 807-8, Vol. 3, G. N. Rec.). Duluth and Sioux Falls are both substantial terminal points and each is a strongly competitive point. The distance between them is 343 miles by the Great Northern, which is the short line. The distance from Duluth to Jasper, Minnesota, the border Minnesota-South Dakota locality on the Duluth-Sioux Falls line of the Great Northern, is 314 miles. Jasper is not a substantial terminal; indeed it is not recognized by the Commission of Minnesota as a distributing station,

of whatever importance. (Exhibit D to Bill of Complaint, p. 28, Vol. 1, G. N. Rec.) It has no railway service in competition with the Great Northern's. It has not, so far as we know, any claim whatsoever by virtue of the application of any principle of rate-making recognized by this Court or by the Interstate Commerce Commission or by railroads in practical operation, to a lower basis of rates from the head of the lakes than is vouchsafed to Sioux Falls. But the rate allowed by the Order of the Commission for the distance between Duluth and Jasper is 61.98 cents. Jasper is at a distance from Duluth of about 91% of the distance of Sioux Falls from Duluth. Its rate as prescribed by the Order of the Minnesota Commission is only about 77% of that prescribed by the Interstate Commerce Commission to Sioux Falls. The Assistant General Freight Agent of the Great Northern testifies that he knows of no method by which these two rates can be maintained without substantial discrimination against Sioux Falls; and none has been suggested. (Maguire, as last above.) It may be argued that the traffic of the Great Northern between Duluth and other Minnesota points is all interstate because its line from Duluth covers a short distance in Wisconsin on its way to other Minnesota localities, and that, therefore, the Great Northern's compliance with the Commission's Order so far as concerns its rates from Duluth was purely voluntary. The argument will be only captious, if made. The reduction of its interstate rates between Duluth and other points in Minnesota was not the merely voluntary act of the Great Northern. It was not made for the mere

"convenience" of the company only. It was the result of absolute necessity of every community on its line reaching Duluth that it be placed in fair relation with other communities in Minnesota. The "convenience" of the Great Northern can not be set ahead of the necessity of its patrons.

It does not make any difference, however, if the argument is sound so far as it goes. The Great Northern on its line between Duluth and Sioux Falls has approximately eight miles in Wisconsin on its northeasterly end, and twenty-nine in South Dakota, on its southerly end. The balance (306 miles) of the distance is within the State of Minnesota. The only necessary amendment of our argument, if the reasons for its unsoundness which, we say, may be offered, are held good, is that showing that under the necessary operation and effect of the Order the Great Northern will be compelled either to reduce substantially its rates between Duluth and Sioux Falls as prescribed by the Interstate Commerce Commission, or discriminate substantially against interstate localities in favor of localities in Minnesota at both ends of the Duluth-Sioux Falls line instead of at only one end. Moreover, we suggest that the failure of the Great Northern to reduce its interstate rates between Duluth and other points in Minnesota to the basis of the state-made rates would have resulted in substantial discrimination against its interstate business between Duluth and other localities in Minnesota and in favor of all points on its line over eight miles southeasterly of Duluth (being the distance on its line from Duluth through Wisconsin into Minnesota) with their business with other localities in Minnesota.

It may again be asserted that the conditions affecting that portion of the haul outside of Minnesota are not conclusively shown to be and are not presumed to be the same as those attending the portion of the haul within Minnesota. As affecting that proposition we say again that if the companies were left to fix their own state and interstate rates they would be compelled to fix them in fair relation to each other all conditions considered; and to fix their interstate rates touching Minnesota with fair relation to the rates fixed in Minnesota upon the local conditions justifying the Minnesota rates. But when the state authorities are allowed to fix the Minnesota local rates, the local conditions in Minnesota are wholly absorbed in the prescribed local rates; and unless they shall discriminate, the carriers are compelled to fix their interstate rates touching Minnesota, not with relation to conditions attending transportation in Minnesota, but on the basis of rates fixed by the authorities of Minnesota. In other words, the carriers must, to avoid discrimination, fix their interstate rates into and out of Minnesota with direct reference to the state-made rates for traffic within Minnesota if they may not discriminate against their interstate rates. If they do so fix them they resign their rights under the Constitution of the United States and the Act to Regulate Commerce, the result being that they are deprived of the power to enjoy rates made by them under direction of Congress and even to enjoy rates made for them by the Commission under the Act to Regulate Commerce. Manifestly, they must either disobey the mandate of the Act forbidding discrimination or lose all their privileges under the Act.

3.

Each Act and Order complained of is violative of the Constitution of the United States and therefore void for that it renders non-performable the functions of the Interstate Commerce Commission as prescribed by the Act to Regulate Commerce.

The Act to Regulate Commerce (24 Stat. 379), as amended by the Hepburn Act (34 Stat. 384), provides in Section 15 thereof as follows:

> "Sec. 15. That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in Section thirteen of this act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges, whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this Act, for the transportation of persons or property as defined in the first section of this Act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess

> of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed."

The duties of the Commission under this section are comprehensive. Congress has imposed upon it an obligation to prevent all violations of the Act. Its chief duties are to determine and prescribe reasonable rates to be charged by carriers subject to the Act and to prevent discrimination between persons, localities and kinds of traffic.

If the carriers had installed the state-made rates and fares between Duluth and other localities in Minnesota and had refused to instal the same rates and fares between Superior and localities in Minnesota, and business interests of Superior had made complaint to the Commission of the discrimination in rates to localities in Minnesota against Superior and in favor of Duluth, what would the Commission have done? Being of the recorded opinion that rates from Duluth and Superior "must be the same" (*Hastings M. Co. v. C. M. & St. P. Ry. Co., supra*) it could prevent the discrimination against Superior only by prescribing and ordering the carriers to maintain the complete state-made schedules—classification, percentage relation between classes, method of extension of the rate, and all—between Superior and localities in Minnesota. In doing so, of course, it would be compelled to forego the performance of its duty under the Act to determine whether the state-made schedules were reasonable *per se,* or even to determine whether the rates by it prescribed might be insufficient under the Fifth Amendment to the Constitution. It would be compelled to forego the exercise of its power and the performance

of its duty under the Act to determine whether the classification or the percentage relation between rates for the several classes as prescribed by the State might be just and without discrimination as applied to interstate traffic. In order to prevent the discrimination complained of it would be compelled to abandon all its other substantial duties under the Act. Indeed, in order to perform either one of its leading duties under the Act the Commission would be constrained to abandon all other substantial duties imposed upon it by the Act. If it would prevent discrimination against localities it would be compelled to prevent it at the cost of its power to prevent discrimination against particular descriptions of traffic or particular persons engaged in that traffic, as well as to pass upon the reasonableness of the rates involved. For example, if Minnesota makes the rate on rye to Duluth 80% of the rate on wheat, the Interstate Commerce Commission must, in order to prevent discrimination against Superior, make the rate on rye to Superior 80% of that on wheat, and the same rates on both as made by Minnesota and without regard to its duty to consider and determine whether either rate is reasonable in and of itself or whether the relation between them is fair and without discrimination. If the Commission would prevent discrimination between different descriptions of traffic and should be of opinion that the relation between rates on wheat and those on rye, as established by Minnesota, was unfair, it would be compelled, in order to remedy the discrimination between the respective descriptions of traffic which would result from the unfair relation, to instal discrimination against Superior in one or the

other classes of traffic. If it should be of opinion that the state-made schedule was unreasonably low as applied to interstate business it would be compelled, as it will hereinafter appear it has been, or, at least, has felt, compelled, to ignore the whole matter of complaint and find itself utterly unable to cure any sort of discrimination complained of.

For the sake of the argument, let us suppose that the Commission should be of the opinion that the Minnesota schedules were not so low as to be violative of the Fourteenth Amendment to the Constitution, that the classification and the percentage relation beween rates for the several classes would not be wholly unjust as applied to interstate business and that it might, in performance of its duty to prevent discrimination, prescribe the Minnesota schedules for traffic between Superior and Minnesota localities without positive or noteworthy breach of any other of its duties under the Act; and that it should prescribe them and order them observed by the carriers. Then let us suppose that the business interests at Bismarck should complain to the Commission that, whereas it had always had and ought to have a basis of rates from Superior equal to that accorded Moorhead, the carriers had installed between Superior and Moorhead a basis 25% lower than that maintained between Superior and Bismarck. It is difficult to see why Bismarck should not be given relief by the Commission, and be accorded the Minnesota schedules—classification, percentage relation between rates for different classes, method of extension of the rates, and all. The Interstate Commerce Commission having once adopted the Minnesota schedules for interstate business, mani-

festly could not depart from them without permitting discrimination at the point of departure; and it would be compelled, therefore, to extend the Minnesota basis over the entire line of the Northern Pacific. If it should not depart from it, and should so extend it, we think it safe to declare that the Northern Pacific would be deprived of its power to pay dividends; because the effect of the extension of the Minnesota schedules upon its revenues would be, as set forth in the finding of the Master, ratified and adopted by the Court, as follows:

> "If it should be necessary for the companies involved, in order that discrimination may be avoided, or in order that the companies may preserve the volume of their respective businesses in interstate transportation free from impairment in volume, to instal for their interstate business a basis of rates no higher than these respectively prescribed in the acts and orders complained of, and to extend the rates for their interstate long-haul business upon the principle provided in said acts and orders, the result will be a substantial diminution in the revenues of the companies from their interstate business. For example, the diminution in the revenue of the Northern Pacific Company for the year ending June 30, 1906, the last fiscal year prior to the taking effect of the order of September 6, 1906, from its interstate business in transportation of commodities covered by chapter 232 alone, if the basis prescribed by chapter 232 had been applied to its rates for such interstate business, would have been $4,193,283.04; and the loss in such interstate revenue for such year for transportation of merchandise covered by the order of September 6, 1906, if the basis prescribed by the order had been applied to its rates for such interstate business, would have been $4,119,761.96. The

loss in its interstate business from passenger transportation, if the two cents maximum rate had been applied during such year, would have been $1,444,955.35, or a total loss, on account of the acts and orders complained of, of $9,758,000.35."

(Opinion of the Court below, pp. 406-7, Vol. 1, N. P. Rec. Complainants' Exhibits 62 to 62-H Johnson, Vol. 10 N. P. Rec.)

We think it safe to assume that the Commission would not feel able to prevent discrimination by enforcing confiscation.

This leads us to a discussion of the contention, made against us consistently from the beginning of these suits, that the whole question is one of the reasonableness *per se* of the prescribed schedules; and that, if not in violation of the Fourteenth Amendment, then, if the result of their maintenance is to produce discrimination against interstate schedules, the result must necessarily be produced by the fact that the interstate schedules are too high.

One principal gravamen of the complaint against the Minnesota schedules is the small rate of progression of the rates with added distance for long hauls. If the schedules had been framed with the design of forcing the carriers subject to them either to discriminate in their rates in favor of Minnesota and against their interstate traffic, or suffer confiscation, they could not have been better designed. The fact is that the question of the reasonableness under the Fourteenth Amendment of the rates complained of, if their effect could be confined to commerce wholly within the State of Minnesota, has no bearing from any

direction upon the question whether the schedules, framed as they are, interfere necessarily and directly with the federal power to regulate commerce among the States. The question of reasonableness under the Fourteenth Amendment is to be determined by the entire result in revenue from the entire schedule. As we have intimated hereinabove, North Dakota may, perhaps, make a schedule as elaborate in detail as that comprehended in the Order of the Minnesota Commission, but with different classification, different relation between rates for the several classes and different method of extension of the rates with added distance. It may claim that its schedule is immune under the Fourteenth Amendment. But with the two schedules, those of Minnesota and North Dakota, to contend with, it will be wholly beyond the Interstate Commerce Commission to perform *any* of its duties regarding commerce between those two States.

Moreover, we call attention to the fact that the very invoking of the supposed principle that if a reasonable state schedule causes discrimination against interstate rates it must be because the established interstate rates are unreasonable, calls upon the Court to determine in the first instance that lawfully established interstate rates are unreasonable; and this it has not power to do.

(*Tex. & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426.)

The supposititious cases of complaint by Superior, Bismarck, etc., based upon the discrimination against them as a result of the operation of the Minnesota

schedules of rates are not in any degree chimerical. There is even now pending before the Interstate Commerce Commission a proceeding instituted by the allied business interests of Sioux City, Iowa. It is complained that formerly the basis of rates between Sioux City and localities in southern Minnesota bore such a fair relation with the basis of rates between the Twin Cities and localities in southern Minnesota, that Sioux City was able to engage in fair competition with the Twin Cities in the distribution of merchandise in southern Minnesota; and that now the carriers serving both Sioux City and the Twin Cities in that formerly and properly competitive territory have installed (under the Orders complained of) substantially lower rates from the Twin Cities into southern Minnesota than the interstate rates to the same localities accorded Sioux City, with the result that Sioux City is no longer able to compete with the Twin Cities in southern Minnesota business.

Traffic Bureau of Sioux City Com. Club v. C. St. P. M. & O. Ry. Co., I. C. C. No. 3881.

The result of this proceeding before the Interstate Commerce Commission is assured by precedent.

In the Matter of Freight Rates, XI Int. Com. Rep. 209, was a friendly proceeding before the Commission in which it entertained the complaint of business interests of Memphis that the defendant railway company was discriminating in favor of Little Rock and Pine Bluff and against Memphis. As is readily discernible from an examination of the case as reported, the predicament of the Commission was this: The rates be-

tween Little Rock and Pine Bluff on the one hand and other Arkansas points on the other had been prescribed by the Arkansas Commission. The railway company thought that they were too low and protested against them on that ground but put them in. It did not reduce its interstate rates between Memphis and Arkansas points to a basis bearing a proper relation to the commission-made rates between Little Rock and Pine Bluff and Arkansas points and the discrimination against Memphis did in fact and concededly exist. The Interstate Commission did not consider the higher basis maintained by the railway company for its interstate business unreasonable unless by comparison with the low schedule prescribed by the State Commission; that is to say, it did not consider the interstate rates between Memphis and points in Arkansas unjust or unreasonable under the provisions of Sec. 1 of the Act to Regulate Commerce. It could not order the railway company to put in unjustly or unreasonably low interstate rates; it could not violate the provisions of one section of the Constitution in order to perform its functions under another. It felt that it had no power to order the railway company to raise its state schedule to a parity of relation with the interstate schedule. Therefore, it confessed itself powerless to aid Memphis upon its complaint that, situated in Tennessee, it was by laws of Arkansas being discriminated against in favor of localities in Arkansas.

In its decision the Commission said:

> "It will thus be seen that the relative rates of which Memphis complains, if we except the jobbers' tariffs above mentioned, were not voluntarily established by defendant. It was not the

free and uncontrolled action of the carrier which brought about the alleged discrimination but the exercise of authority by the Arkansas Commission. The defendant in nowise acquiesced in the reduction ordered by that Commission but on the contrary manifested its opposition by repeated protests. Short of entering upon a course of litigation with the State of Arkansas the defendant appears to have done about all it could to show its objection to the rates imposed; and has even gone to the extent of printing a protest upon the face of its tariffs.

"So far as the discrimination of which Memphis complains was caused by the action of the Arkansas Commission, without the consent and against the protest of defendant, it is certainly doubtful in the present state of the law whether the defendant can be held responsible."

Can there be a better example of state laws which operate directly and necessarily to prostrate the Government and its laws "at the feet of local authority"? *Northern Securities Co. v. U. S., supra.*

The Commission seems to indicate that if the railway company had voluntarily established the local schedule it would have been guilty of discrimination under the Act to Regulate Commerce, and a remedy might have been afforded; but the discrimination was not the voluntary act of the railroad but was compelled by the State of Arkansas; and so the Commission could not afford a remedy.

The decision of the Commission in the recent Pensacola Fish Case, so-called, before the Interstate Commerce Commission (*Saunders v. Southern Express Co.*, No. 1621, decided Jan. 10, 1910), is illuminative. The Commission, after reciting the natural and acquired

advantages of Pensacola as a fish distributing locality, says:

> "It is not to be supposed that these advantages at Pensacola escaped the attention of the Railroad Commission of Alabama when, on September 15, 1907, it had under consideration the rates on fish from Mobile to the fish consuming points in that State. It is indeed asserted in the brief of counsel for the defendant that the extensive reduction in rates then made by the State Commission was not based on any demand on the part of fish dealers at that point or for the purpose of relieving the fish traffic out of Mobile from oppressive rates. It is also said that no Mobile fish dealer appeared at that hearing or at any other hearing when the Alabama fish rates were involved, and it is intimated that the reduction was made in pursuance of a policy to secure Alabama territory to Alabama dealers to the exclusion of outsiders."

And further:

> "The complainant's purpose in instituting this proceeding was to bring to our attention the discrimination in the defendant's rates as between Pensacola and Mobile. Upon a careful examination of the complaint we do not find that the petitioner intended to assail the reasonableness of the defendant's rates out of Pensacola when considered in and of themselves. On the contrary, the prayer of the complaint in so many words is that the Pensacola rates are unreasonable only when compared with the defendant's rates to the same points from Mobile. Counsel for the complainant opens his brief by stating that the purpose of the complaint is to compel the defendant to 'so adjust its rates on fresh fish as to avoid the discrimination now existing between' Mobile and Pensacola."

It passes upon the reasonableness of the rates from Pensacola to Alabama points as reasonableness is to be determined under the first section of the Act to Regulate Commerce as follows:

> "In what is here said we are not to be understood as justifying the Pensacola rates to Alabama points. As heretofore stated, the reasonableness of such rates is not in issue before us. But from our examination in *Bannon v. Southern Express Co., supra,* and in this case, of the fish rates from this general territory, we may say with some confidence, upon our present information in the matter, that no reduction that we could fairly require the defendant to make would suffice to do more than merely to modify the discrimination in the defendant's rates of which complaint is made. The discrimination would not be eliminated."

It proceeds as follows:

> "We conclude upon the evidence now before us and upon a rather wide knowledge of fish rates, that the rates out of Mobile are lower than we should feel justified in requiring the defendant to maintain on fish shipments out of Pensacola to the same points.
>
> "While upon general principles of comity the action of a State Commission in fixing a rate on state traffic must be treated with all due respect, this Commission has never felt itself bound to accept a state-made rate as a necessary measure of an interstate rate. In *Hope Cotton Oil Co. v. Texas & Pacific Ry. Co.,* 12 I. C. C. Rep. 265, 269, we said:
>
> 'While a rate fixed by a state statute or a state commission is naturally and properly entitled to

respectful consideration, it has no greater sanctity, as applied to interstate traffic, than a rate established by a railroad company, and we should not hesitate, upon proper evidence that a rate so established would be unjust either to a carrier or to a shipper, to refuse to accept it as a basis for fixing an interstate rate.'

"That rule has been followed in other cases and must necessarily always be the basis of our action when dealing with interstate rates. To depart from that course would amount to an abandonment of our duties under the law and would result in the fixing of interstate rates by State commissions. We do not know what evidence was before the State Commission when these rates on fresh fish were ordered into effect in Alabama, and are not to be understood, therefore, as criticising that body for its action in this regard. But from what has been said it is clear that, with all the light on the question that the record and our own investigations give us, we can not accept the Alabama rates as a fair basis for fixing the defendant's rates to the same points from Pensacola. To do so would be to require the defendant to receive for that service less than seems to us to be reasonable compensation. Nor, in view of the protest of the defendant against the action of the State Commission, and of its efforts before that body to secure a withdrawal or modification of the order, may the defendant fairly be held responsible for the resulting discrimination. The relation of rates thus produced was neither voluntary nor the consequence of any uncontrolled action on its part; the continuance of the relation thus created is not in any sense attributable to the defendant unless it may be said that the defendant is under an obligation to correct the discrimination by voluntarily reducing its Pensacola rates to the basis of the Mobile rates. Substantially such a state of facts was presented in the proceeding entitled *In the*

Matter of Freight Rates between Memphis and points in Arkansas, 11 I. C. C. Rep. 180, 209, and the Commission found in the record no grounds upon which the carrier could be held at fault for a discrimination arising under similar conditions. Moreover, as the defendant's state rates are held down under the compulsion of an order by the State Commission, an order by this Commission requiring it to cease and desist from the resulting discrimination against Pensacola would be equivalent to an order requiring the defendant to reduce its Pensacola rates to the level of the state rates out of Mobile. Such an order we are not prepared to enter, at least at this time and as now advised.

"This view of the record will leave the Pensacola fish dealers without present redress before this Commission, so far as the discrimination complained of is concerned. But the situation is one that we find it difficult to remedy under existing legislation. While we have full authority, upon certain principles and within certain limits definitely fixed in the amended act, to deal with interstate rates, it is expressly provided in section 1:

'That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or territory as aforesaid.'

"This language seems to have but one meaning, and that is that, although the Congress constitutionally may give and in fact has given to the national commission authority to control and regulate the rates to be demanded and accepted by interstate carriers on interstate traffic, it has excluded us from the exercise of any such powers as to the purely state traffic of interstate carriers. Whatever authority may be vested in the courts for the redress of such wrongs, it seems reason-

> ably clear that this Commission, under such circumstances as are disclosed on the record, may not lawfully interfere by an order, the purpose of which is directly or indirectly to affect the rates imposed upon the defendant by the order of the Alabama commission."

If there can be a better example of the prostration of the Federal Government and its laws at the feet of local authority than that of the Memphis-Arkansas rate case *(supra)* it is furnished by this case. The Commission again says that it can not perform its duty to prevent discrimination without violating the Fifth Amendment—that it can not prevent the non-observance of the third section of the Act to Regulate Commerce because its action would deprive the carrier of its rights under the first section.

We shall be met here again by the argument that the Interstate Commerce Commission did not have jurisdiction to entertain the complaint in *In the Matter of Freight Rates* or that in *Saunders v. Southern Express Co., supra,* or in other proceedings of like nature, its decisions in which might be cited; that it has not jurisdiction in the proceeding of *Traffic Bureau, &c., v. C. St. P. M. & O. Ry. Co., supra;* and that it would not have jurisdiction in the supposed proceedings of Superior, Bismarck, etc., *supra,* because of the proviso to Section One of the Act to Regulate Commerce, and the fact that the complaints have been, are, or would be (in the supposed cases) based on discrimination against interstate localities resulting from the proper exercise by a State of its reserved powers.

Perhaps we have said all that may need to be said

about the meaning of the proviso, but, because the present discussion is upon the inability of the Commission to exercise its power if the state regulations are valid, there arises a fair connection for a further suggestion with regard to the extent of its power.

The proposition against us is this: The proviso to Section One of the Act to Regulate Commerce is: "That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid"; the effect of this proviso is to deprive the Commission of all jurisdiction over matters in which transportation covered by the proviso is necessarily involved; indeed, doubtless, that the result would have been the same if the proviso had not been inserted in the Act because of the lack of power in Congress in any manner to interfere with regulation by States of their internal commerce.

It seems to us that the true test of the soundness of this proposition lies in its application to the supposed case that a carrier *of its own volition* should establish rates which would be discriminatory in favor of state commerce and against interstate commerce because the proviso covers equally all rates, whether made voluntarily by carriers or pursuant to mandates of sovereign powers. The power to discriminate against commerce is the power to destroy it. Could a carrier of its own volition establish rates so severely discriminatory in favor of localities within one State and against localities in a neighboring State as to destroy the commerce interstate? If it

could be prevented from doing so it could be prevented only by the application of the Constitution and laws of the United States. If it could not be prevented, it is either because the grant of power to Congress as contained in the Commerce Clause of the Constitution is insufficient to that end, or that, because of the proviso, the exercise by Congress of its granted power is insufficient. If the former, then the full, complete and exclusive power to regulate commerce among the States granted to Congress by the Commerce Clause of the Constitution is not complete enough to prevent the destruction of that commerce, by the wilful action of carriers who are engaged in it and upon which the existence of that commerce depends, to such extent that Congress shall have nothing to regulate. If the latter, then the carefully devised plan of Congress to regulate interstate commerce deliberately offers a method to carriers covered by it of avoiding all such regulation through destruction of the interstate commerce which alone can be regulated.

If the maintenance of such discrimination against interstate commerce by carriers of their own volition could be prevented, it could be prevented only by invoking the Constitution and laws of the United States. And, if it could be prevented under the Constitution and laws of the United States, it could be prevented notwithstanding the plea of the carriers that the laws of a State justified the discrimination, expressly permitted it, or even compelled the carriers either to maintain the discrimination against interstate commerce or to surrender their rights under the Constitution.

This argument may appear to have been unnecessarily long; but we have not touched many subjects worthy of argument. We have carefully refrained from making any argument that might come under the ban of Mr. Justice Brewer's decision in *Ames v. Union Pacific Ry. Co.*, 64 Fed. 172, as follows:

> "Neither can I understand how the reduction of local rates, as a matter of law, interferes with interstate rates. It is true the companies may, for their own convenience, to secure business, or for any other reason, rearrange their interstate rates, and make them conform to the local rates prescribed by the statute; but surely there is no legal compulsion. The statute of the state does not work a change in interstate rates, any more than an act of Congress prescribing interstate rates would legally work a change in local rates. Railroad companies cannot plead their own convenience, or the effects of competition between themselves and other companies, in restraint of the otherwise undeniable power of the state."

We have not made an argument based on the finding of Circuit Judge Sanborn as follows:

> "Duluth, Minnesota, Superior, Ashland, Green Bay, Manitowoc, Sheboygan, and Milwaukee, Wis., Gladstone, Mich., Chicago, Ill., the Peoria, Ill., district, the Springfield, Ill., district, the Streator, Ill., district and the La Salle, Ill., district, are all competitive points for the distribution of coal into the state of Minnesota.
>
> "For many years rates on coal from the various distributing points to localities in southern Minnesota have borne such a relation as to admit of free competition of the various distributing points and the carriers serving them.

"If the rates on coal prescribed by chapter 232, Gen. Laws 1907, shall take effect, the result will be substantial reduction in rates on coal from Duluth to southern Minnesota localities. Such a reduction will deprive all these various distributing points in Wisconsin, Michigan, and Illinois of their power to compete with Duluth in its distribution of coal in Minnesota, unless the carriers serving them shall reduce their interstate rates into Minnesota to a parity with those prescribed by chapter 232 from Duluth. If such carriers shall reduce their interstate rates in Minnesota to a parity with the rates prescribed by chapter 232, the relation which now exists between rates on coal from these various distributing points and localities in northern Iowa and in South Dakota will be destroyed, unless rates shall be similarly reduced from these various distributing centers to localities in these two districts.

"Interstate rates on cattle, hogs, sheep, and coarse grain would be affected by the rates prescribed by chapter 232 in the same manner as rates on wheat and coal."

(Opinion pp. 403-4, Vol. 1 N. P. Rec.; Complainants' witness Maguire, pp. 799-804, Vol. 3 G. N. Rec.; Complainants' Exhibit 40 and 41, Maguire, Vol. 6, G. N. Rec.; Complainants' witness Tittemore, pp. 899-909 and 960-4, Vol. 3, M. & St. L. Rec.)

If we should take time to make such an argument it would not be predicated on the fact that carriers whose business with Minnesota in the distribution of coal is interstate would, as a necessary effect of the operation of chapter 232 prescribing rates for the carrying of coal within Minnesota, be compelled "for their own convenience" or "to secure business" to reduce their interstate rates to the basis of the state-made rates; but would be predicated upon the fact that

the necessary and direct effect of the installation of the state-made rates on coal would be to give Duluth a monopoly in the distribution of coal into Minnesota unless the railway companies serving the coal distributing localities situated outside the State of Minnesota should give them rates consonant with Minnesota's rates, and so avoid discrimination against them to such an extent that they could not compete with Duluth.

We have not even made an argument predicated upon the fact that the Northern Pacific has both an interstate and a local route between Duluth and other localities in Minnesota (See Map 1) and the Great Northern has both an interstate and a local route between the Twin Cities and nearly all localities on its line on the Minnesota side of the Red River of the North south of the Canadian border line (See Map 2). Such an argument would not have been based upon the necessity of equal rates, state and interstate, for the convenience of the carriers, upon the ground of competition of carriers, or, even, upon the ground of competition of localities and the necessary discrimination as between them, but only upon the ground of discrimination between state and interstate rates, and the claim that, if Minnesota may regulate rates on the routes wholly within the State, Congress need not even make an effort to regulate rates on the interstate routes—unless, indeed, by reducing them. For whichever, of the state or interstate rates, shall be lower, must control; and the commerce, state or interstate, having the higher rates must perish.

The evidence in the cases shows that since the installation of the two cents passenger fare law, the fares for interstate transportation of all passengers out of, into or through the State of Minnesota, have been substantially reduced (Complainant's witness Cleland, pages 1616, et seq., Vol. 4, N. P. Rec.; complainant's Ex. 53 Cleland, Vol. 10, N. P. Rec.); that rates for transportation of merchandise from all points easterly or southerly of Minnesota, to localities on the lines of the Northern Pacific and Great Northern within Minnesota, and from the easterly terminals of the companies to practically all stations in North Dakota, have been substantially reduced (Complainant's witness Maguire, pages 818-920, Vol. 3, G. N. Rec.; complainant's Ex. 44 Maguire, Vol. 6, G. N. Rec.; Complainant's Ex. 46 Baird, Vol. 10 N. P. Rec.); and that, if the Commodities Act had taken effect, substantially all rates for interstate transportation into or out of the State of Minnesota of commodities covered by it would have been substantially reduced. Indeed schedules of such reduced rates had been prepared by the traffic men of all the companies and would have been filed and made effective had the restraining order issued upon the institution of these suits not been issued. (Complainant's witness Tittemore, pages 965-8, Vol. 3, M. & St. L. Rec.; Complainant's witness Maguire, pages 815-17, Vol. 3 G. N. Rec.). The reductions in the merchandise interstate rates out of Minnesota have not been great enough to prevent discrimination in favor of business local to Minnesota, and against business between Minnesota and neighboring States, and, if the Minnesota rates are declared to be valid, still further reductions in interstate rates must be made if

that discrimination which now abundantly exists shall be removed.

If the Interstate Commerce Commission has jurisdiction to remedy the discrimination against interstate rates in favor of state rates, it may remedy that discrimination, if the state rates are valid, only by prescribing and ordering observed by the carriers, interstate rates which shall be in full consonance with state-made rates. If this is the only method afforded the Interstate Commerce Commission of providing a remedy for this discrimination, the power of Congress is not supreme over interstate commerce, but subordinate to that of the States.

We have said more than once during the progress of these suits that we did not maintain, and never under present conditions should be heard to maintain that a State has no power to regulate rates for traffic wholly within its limits. We have admitted and do admit that the States have such power "unless what is done amounts to a regulation of foreign or interstate commerce".

Stone v. Farmers Loan and Trust Co., 116 U. S. 307 (1885).

Our entire argument is based on the proposition that the exercise of the conceded powers of the States is subordinate to that of the conceded powers of the Congress, and upon the further proposition that, if the necessary operation and effect of an act of a State impinges against the full and free exercise of a right or privilege conferred by the Constitution and laws of the United States, the law of the State is void.

From time to time during the progress of these suits suggestion has been made that a decision by the Court

that the state-made regulations complained of are void, because they interfere with the power of Congress to regulate interstate commerce, will leave a "twilight zone", so called, within which the carriers will be left without subjection to the power of regulation by either sovereignty, federal or state, and may fix rates and otherwise conduct their affairs regardless of the rights of the people. No such region exists, none such ever has existed, and none such can exist under the Constitution of the United States. Before the Act to Regulate Commerce was enacted carriers were subject to regulation in interstate commerce by Congress. The power of Congress was complete and exclusive and comprehended all means for its full and proper exercise; and any state law, which through its necessary operation and effect trespassed upon the domain covered by it was void. This condition existed by virtue of the Constitution through joint grant of the power by the States subject to the Constitution. All power of regulation of commerce, excepting that granted to the Congress, was reserved to the States; and the States had full and conceded power to regulate all internal commerce, provided only that it might not be exercised in such manner as necessarily to diminish or impair the power granted to Congress. In other words, Congress had the granted power to regulate commerce among the States, and as an accompaniment to the grant the privilege to avail itself of all proper means for the exercise of the power; and the States had what power was remaining to them after the grant. This was by virtue of the Constitution; and no law of Congress or of any State could or can change in any degree the respective powers of the federal and state

governments; nor can any change of those respective powers be made unless by amendment of the Constitution. Therefore, neither the body of the Act to Regulate Commerce, nor the proviso in Section 1 thereof, may properly be construed to have effected any such alteration. If, under the Constitution, any "twilight zone" might exist within which matters of commerce, whether state or interstate, might not be subject to regulation by the exercise of either federal or state power, such matters must be such as *neither* will or will not necessarily regulate or directly interfere with regulation of interstate commerce. If, by the Act to Regulate Commerce, Congress has explicitly or impliedly placed any matters of regulation of commerce outside its power, which are not within the power of the States, it has attempted to do that which the Constitution did not do, and therefore has sought to amend the Constitution. The decision of the Court below recognized the force of these principles. It did not leave any matters of regulation of carriers without power of regulation. It held that

> "To the extent necessary completely and effectually to protect the freedom of and to regulate interstate commerce, the nation by its Congress and its Courts may affect and regulate intrastate commerce, but no farther.
>
> To the extent that it does not substantially burden or regulate interstate commerce a State may regulate the intrastate commerce within its borders, but no farther."

(Opinion of Circuit Judge Sanborn, pages 384-5, Vol. 1, N. P. Rec.).

We cannot conceive of any possible matters of regulation of commerce, whether state or interstate, that must not necessarily fall under the application of one or the other of these principles supplemented by the declaration in the Constitution that Congress shall have power to regulate Commerce among the States. Any criticism of the decision of the Court below which is attempted to be based upon the claim that the constitutional rights of States are encroached upon by it, is wholly unwarranted; so far so that it must rest on utter lack of comprehension of what the decision really is. The power of States to regulate their internal commerce is not denied. It is denied *only* that such power may be exercised in such manner as to render nugatory the power of Congress to regulate commerce among the States. The whole contest resolves itself, then, into a question, not of the ability of the States to exercise their sovereign powers, but of the survival of the federal powers as created by the Constitution. If the laws and orders complained of are held valid, then States may discriminate against each other as fully and effectively as they could and did discriminate in the creation of conditions which above all others led to the adoption of the Constitution. The result must be a contest by States, each with the other, for commercial supremacy, and the destruction of commerce between them—the resolving again of the United States into petty, warring sovereignties, such as existed before the Constitution was adopted.

The result is already seriously foreshadowed, if, indeed, it has not fully arrived. The Railroad Commission of Iowa has made a clear announcement of its policy to adjust rates within the State in such manner

as to protect its home industries against competition by industries in other States. (See its Report for year ending Dec. 7, 1909.) And there is now pending before the Interstate Commerce Commission *(Railroad Com'n of Louisiana v. St. Louis Southwestern Ry. Co. et al.,* I. C. C. Com'n Docket No. 3918) a proceeding based upon a petition filed by the Railroad Commission of the State of Louisiana against several railway companies doing business interstate between Louisiana and Texas. The gravamen of the petition is that, whereas Shreveport has heretofore had an adjustment of interstate rates into Texas such as to enable it to transact a substantial jobbing business with Texas localities, the railroads now maintain a basis of rates within the State of Texas so much lower than that for traffic interstate between Shreveport and Texas, as to deprive Shreveport of the power to compete with localities in Texas for Texas business. The answers of the railroad companies disclosed that the discriminatory basis in favor of Texas distributing points and against Louisiana points was caused by the fact that the Texas Railroad Commission had ordered the Texas basis to be established; that it was unreasonably low, but that, for various reasons, the railroads had felt unable to contest the validity of the orders of the Texas Commission. Thereupon the Louisiana Commission filed its supplemental petition seeking to have the Texas Commission made a party defendant in the proceeding. Its supplemental petition was denied by the Interstate Commerce Commission; but the Texas Commission was offered an opportunity to appear voluntarily in the proceeding. The taking of testimony has been completed, and no member of the Texas Commission has

appeared or been heard from. The evidence in the case makes it apparent that one of the reasons, possibly a most potent one, why the railroads felt unable to contest the orders of the Texas Commission or indeed, if they could have afforded to do so, to reduce the interstate rates from Louisiana into Texas to the basis of the Texas rates, was the threat of the Texas Commission to take further action against them if they should do so. Apparently the policy of the Texas Commission is to protect home industries against competition by industries in other States.

In conclusion, the Great Northern and Northern Pacific railroads are transcontinental systems of great national importance. Each joins the waterways of the Great Lakes with the Pacific Ocean. Each traverses territory of as largely undeveloped and rapidly developing industrial capacity as exists in the country. The business of each which is local to the State of Minnesota, though important in itself, is, when compared to its interstate business, of comparative insignificance. The freight business of the Northern Pacific, for example, which is local to the State of Minnesota is but 2.67% of its entire freight business and 12.33% of its entire freight business touching the State. Its local passenger business in Minnesota is but 5.79% of its entire passenger business and 67.21% of its passenger business touching the State. (Complainants' Ex. 54 Johnson, Vol. 10 N. P. Rec.)

As it is apparent that the business of the companies local to the State is comparatively insignificant, so necessarily must it appear that their local business is

comparatively of small importance to the inhabitants of the State when compared with the importance of their general interstate business to the people at large. It is clear that the business of these two companies is of national interest rather than local and to an extent perhaps as great as that of any carrier in the country. They never have considered state lines in making rates or otherwise regulating their traffic; they have always carried on their business on a national basis, so to speak, rather than on a local. If either of them should circumscribe an area by artificial boundaries and prescribe rates different, either in the amount of particular rates, the relation of rates to each other, the progression of the rates with added distance, or in any other respect in which rates may differ, to rates prescribed for an adjoining area which possessed conditions surrounding transportation wholly equal to those of the circumscribed area, how could it defend against a charge of discrimination? If it could not make such a defense if it should establish such different rates of its own accord in an area of its own selection, could it successfully make it on the ground that it had established them in an area bounded by state lines, and that its discrimination was only against interstate localities? And if it could not, would its position be changed by the plea that the law of a State justified it?

JARED HOW,
HALE HOLDEN,
PIERCE BUTLER,
WILLIAM D. MITCHELL,
Solicitors for Respondents.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

GEORGE T. SIMPSON, et al.,
Appellants,
vs.
DAVID C. SHEPARD,
Respondent.
No. 599

GEORGE T. SIMPSON, et al.,
Appellants,
vs.
EMMA B. KENNEDY, Executrix, et al.,
Respondents.
GEORGE T. SIMPSON, et al.,
Appellants,
vs.
HENRY A. JAMES,
Respondent.
Consolidated No. 600

GEORGE T. SIMPSON, et al.,
Appellants,
vs.
WILLIAM SHILLABER,
Respondent.
No. 601

Master's Report to the Circuit Court of the United States, District of Minnesota, Annotated by References to Testimony and Exhibits.

Filed by Respondents.

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"To the Honorable, the Judges of the Circuit Court of the United States for the District of Minnesota, Third Division, sitting in equity:

Now comes Charles E. Otis, by an order of Hon. Walter H. Sanborn, one of the Judges of said Court, made and filed with the Clerk thereof, in each of the above entitled suits, on the 4th day of May, A. D. 1908, appointed Special Master in Chancery, in said suits, respectively with power and direction to take and report to the Court the evidence therein, to examine such evidence, make all necessary computations, find and state the facts so found and the results of such computations, and recommend to the Court a form of a proper decree in each of said several suits, and respectfully reports:

I.

Introductory.

Having first taken and filed with the Clerk of Court his oath of office in each of said suits, the Master summoned the respective parties before him on the 20th day of May, 1908, for the consideration of the matters to him referred and at the time so appointed it was arranged that Complainants should commence their offer of testimony on the 2nd day of June 1908, and proceed with the same with all convenient speed.

By orders simultaneously made and filed and of like tenor and effect there were, in like manner, so referred to the Master nine several suits, consisting of the three above entitled and six others of the same general nature which at about the same time had been instituted by stockholders of railroad companies doing business in Minnesota as complainants against the re-

spective companies of which the respective complainants were stockholders, the Attorney General of the state of Minnesota and the members of the Railroad & Warehouse Commission of Minnesota as defendants, in all of which the solicitors and counsel were substantially the same. The grievances complained of were of the same general nature and all sought the same relief. Because the issues were identical or closely related, the determination of which would have, as to many of them, a like result in each case, it was arranged that the evidence submitted in any one of the cases in which testimony should be offered should, so far as applicable, material and relevant to the issues in any of the other cases, be received and considered as evidence in each of the cases. For the same reason, and because the several suits have been tried and submitted together, it has seemed to the Master that he should make and file in each suit in which evidence was offered a report identical in form but so broad as to cover all the matters relative and pertinent to each thereof and that thus the Court would be materially assisted in reaching its determination in the several causes.

For convenience, the suit against the Northern Pacific Railway Company and others will be referred to as the Northern Pacific case, the suit against the Great Northern Railway Company and others will be referred to as the Great Northern case and the suit against the Minneapolis & St. Louis Railroad Co. and others as the Minneapolis & St. Louis case.

According to arrangements so made, the taking of testimony was begun and diligently proceeded with, Mr. George N. Hillman, appointed by the Court for

the purpose as reporter, taking down the evidence, in the presence of the Master, and transcribing the same, as directed by order of reference, thus making and preserving a full record of the testimony and of all matters and proceedings from time to time had and taken before the Master, all of which, properly certified by the reporter as being full, true and correct, is herewith presented to the Court and filed with the Clerk thereof, to be preserved as a record in each of the suits.

It soon became manifest that it would be impossible to take the evidence within the time limited in said orders by the Court, much of it being statistical and historical in character, covering a long period of years and consisting of many and voluminous tables of figures contained in exhibits requiring careful preparation and the examination of many books of account and records for their proper presentation as testimony in court and for purposes of cross-examination. It was, therefore, eventually arranged that of the nine cases so referred to the Master evidence in three thereof should first be taken and considered by the Master and reported to the Court, and to this end the suits above entitled were selected and it was mutually agreed that the other six suits so referred should rest in abeyance until those selected should have been duly reported to the Court and by it finally determined.

It was further arranged that the taking of evidence in these three cases should be proceeded with as diligently as practicable, alternating as should be most convenient and best facilitate the progress thereof, and without following any fixed order of proof, either on the part of the complainants or defendants, and

that the limit as to time for taking testimony fixed by the orders of Court should be considered as removed without making application to the Court therefor, save that the same should be proceeded with diligently and without unnecessary delay.

The taking of testimony in the three above selected cases was not finally closed until May 26, 1910, and final submission to the Master was made on the 29th day of July, 1910.

In the Northern Pacific suit the Complainant Charles E. Perkins has died and by order of Court the suit has been continued in the name of David C. Shepard, the surviving complainant, and by him an amended and supplemental bill of complaint was filed.

The suit of Henry A. James against the Great Northern Railway Company and others has been consolidated with the suit of John S. Kennedy and Henry F. Dimock against the same defendants, and by these complainants an amended bill of complaint has been filed. Said John S. Kennedy has died, his death has been suggested to the Court and the executors of his will have been substituted as parties complainant in his place.

The terms of office of defendant Edward T. Young as Attorney General and of defendant William E. Young as a member of the Railroad & Warehouse Commission having expired, an order has been duly entered by the Court substituting in each of the three cases as parties defendant George T. Simpson, who has been elected Attorney General of the state of Minnesota to succeed said Edward T. Young and Charles E. Elmquist, who has been elected a member of the

Railroad & Warehouse Commission of the state of Minnesota to succeed said William E. Young.

The Attorney General and the members of the State Railroad & Warehouse Commission have filed answers to the bills and supplemental bills in all of the above entitled causes. No answer has been interposed by the defendant railroad companies.

The defendants other than the railroad companies, the Attorney General and the members of the Railroad & Warehouse Commission, in the Northern Pacific and Great Northern cases are all citizens of Minnesota and engaged in the business of receiving and shipping freight over the lines of the defendant railroad companies in said state and make use thereof for passenger transportation, and are made defendants as representatives of and to protect the rights of a large class of shippers and passengers, so numerous that it was impracticable to make all of them parties defendant. No answers have been interposed by them or on their behalf save that their rights are fully protected by the answering defendants.

II.

"Legislation and Matters Directly Pertaining Thereto.

By Chapter 28 of the Revised Laws of Minnesota 1905, being legislation originally enacted in 1887 as amended in 1901, the general supervision of railroad and express companies doing business in the state of Minnesota as common carriers, and all public warehouses, is vested in a board of three members known as Railroad & Warehouse Commission, with power to adjust and fix rates and prescribe rules and regula-

tions for the conduct of the business of such companies, and fines and penalties are by said act prescribed for failure to comply therewith. The here material sections of said act are as follows:

'1969. Complaint that rate is unreasonable—Duty of commission—Upon the verified complaint of any person or of any corporation, private or municipal, that any tariff of rates, fares or charges, or any part thereof, or of any classification is unequal or unreasonable, the commission shall proceed to investigate the matters alleged in such complaint, and for the purposes of such investigation they may require the attendance of witnesses and the production of books, papers and documents. If, upon the hearing, such tariff of rates, fares, or charges, or any part thereof, or of such classification is found to be unequal or unreasonable, the commission shall make an order stating wherein the same are so unequal or unreasonable, and shall make a tariff of rates, fares, charges and classification which shall be substituted for the tariff so complained of. The tariff so made by the commission shall be deemed prima facie reasonable in all courts and shall be in full force during the pendency of any appeal or other proceedings to review the action of the commission in establishing the same.

'1970. Investigation without complaint—The commission shall also of its own motion investigate any matter relating to the management by any such carrier or warehouseman of its business or the reasonableness of any rates, fares, charges, or classifications, whenever, in its judgment the public interests require it, and in such case the procedure shall be, as nearly as may be, as provided upon the filing of a complaint, and the findings and order in such case shall have the same effect as those made upon complaint.'

During the 1905 legislative session of Minnesota, a joint resolution of the House and Senate was passed, approved April 14, 1905 (Session Laws of 1905, Chap. 350), directing the Railroad & Warehouse Commission 'to undertake the work of securing a readjustment of the existing freight rates in this state which will give a more uniform system of rates throughout the state and a uniform scale of percentages which each class rate shall bear to the first class, the re-adjustment to secure a substantial reduction in the existing merchandise rates.' At the same time funds were provided to enable the Commission to secure a physical valuation of all the railroad properties within the state."

Note.

Testimony of Chas. F. Staples, Commissioner—
6 N. P. 2622.

"At the same session of the legislature, by Chapter 176 of the laws of that year, railroad companies within the state were prohibited from changing any state rate except upon application to the Commission and its consent obtained. Theretofore it had been the practice of such carriers to increase or reduce their rates at will without previous notice and free from governmental control.

Prior to such legislation the Commission had been diligent in supervising and regulating the methods of business of such carriers with reference to the furnishing of cars, adjusting minimum carload weights, equal-

izing as far as practicable rates between localities and between shippers so as to prevent unjust discrimination between such localities and between individual shippers in the same localities, securing reasonable rates and switching charges in particular cases, and supervising like matters arising between shippers and carriers, most of which were usually adjusted by mutual concessions and compromises without formal investigation or order.

With reference to the matter of rates complaints were almost invariably based on one of two claims, either that somebody in the same or in a nearby town was getting a better rate or that the rate to some particular town was unreasonably high as compared with the rate to some other town on the same or some other line of road with reference to the relative mileage, and such complaints were usually confined to some particular commodity.

Alleged discrimination between localities and shippers, not excessive rates, was, with respect to tariffs, substantially the only ground of complaint.

Through the active interposition of the State Commission reductions and readjustments throughout the state on all railroads were secured in rates upon grain, coal, lumber and livestock in both state and interstate traffic. The Commission had not, however, undertaken to prescribe general schedules or tariffs covering all articles and commodities."

Note.

Chas. F. Staples, Commissioner—
6 N. P. 2609:2763:2766:
2772.

"After the legislation of 1905, and pursuant thereto, the Commission made an extended investigation of the so-called merchandise rates charged by all railroad companies throughout the state doing business therein for the transportation of freight merchandise between points in Minnesota without, however, making a physical valuation of the properties employed in such service, and made up and completed full schedules of rates covering all merchandise transportations and notified such railroad companies to show cause why such schedule should not be promulgated as a maximum schedule of rates for all said railroads between points within the state.

Pursuant to such notice public hearings were had before the Commission, extending over a period of several months, in which the railroad companies appeared and took an active part and submitted a large amount of testimony with reference to the matters under consideration, sufficient in the opinion of the Commission to enable it to act intelligently in the premises, and thereupon, on September 6, 1906, it made and served an order on all of said railroad companies, to take effect November 15, 1906, a true and correct copy whereof is annexed to and made part of the bills of complaint in these cases."

Note.

Exhibit 1, Amended and Supplemental Bill of Complaint—Northern Pacific Case—
1 N. P. 143.

"Thereafter, on May 3, 1907, said Commission in like manner made and served on all the defendant railroad companies an order supplemental to said order of September 6, 1906, a copy of which is annexed to the bills of complaint herein and made part thereof, and was made for the purpose of securing more favorable in-rates to a number of jobbing centers other than the eastern terminals of St. Paul, Minneapolis and Duluth, and was so made pursuant to a provision of the order of September 6, 1906, in the form of a note thereto to the effect that such action would be taken if further satisfactory adjustments should not be made by the railroad companies.

The volume of business and increased facilities for handling the same at certain large and important stations called terminal or distributing stations substantially reduced the cost of transportation to and from such points and justifies preferential rates in favor of the patrons thereof—a condition recognized by the Commission's orders. Such rates are known as distributive or terminal rates and are the rates specifically named in the schedules of rates which form a part of said orders.

Rates upon shipments between points neither of which are terminal or distributive stations are known as distance tariff rates and are the same as terminal rates for like distances with five per cent added.

By the Western Classification, so-called, and to which reference is made in said orders, substantially all commodities and property which are the subject of transportation are classified and arranged in groups with reference to their general character and value and the cost of transportation thereof, and such classifica-

tion, with modifications from time to time made therein, has long been used by common carriers in the West and Northwest as a basis for fixing rates, the commodities of each class taking the same rate under like conditions. In Minnesota, however, a large number of commodities, amounting to several hundred, have, by the intervention of the Commission, been removed from such Western Classification and given special rates known as "commodity rates" or reduced in class so that the Western Classification in operation in Minnesota is very materially different in many respects from the Western Classification in general use as a basis of rates in other states.

The schedule of rates set forth in the order of September 6th was such that each rate for each class for any distance bore such an exact relation to each other rate that, given one rate out of the schedule, any other rate could be ascertained by mathematical calculation and without reference to the schedule itself. The plan of the schedule is this:

For first-class merchandise an allowance of 11.02 cents per cwt. is made for terminal charges and for each five miles or fraction thereof up to 200 miles, .98 of a cent for hauling charge; so that for a distance of five miles the rate is 12 cents per cwt., for a distance of ten miles the rate is 12.98 cents per cwt. and for a distance of 200 miles the rate is 50.22 cents per cwt. After a distance of 200 miles is reached .98 of a cent is allowed per cwt. as a hauling charge for each ten miles or fraction thereof up to 400 miles; so that the rate for 200 miles being 50.22 cents per cwt. the rate for 210 miles is 51.20 cents, for 220 miles the rate is 52.18 cents and for 400 miles the rate is 69.82 cents

per cwt. After a distance of 400 miles is reached .98 of a cent is allowed as a hauling charge per cwt. for each 20 miles or fraction thereof up to 500 miles; so that the rate for 400 miles being 69.82 cents per cwt. the rate for 420 miles is 70.80 cents and the rate for 500 miles is 74.72 cents per cwt.

The rates for classes other than the first class are a fixed per centum of the corresponding rates for the first class, those for the second class being 83 1/3 per cent, of the third class being 66 2/3 per cent, of the fourth class being 50 per cent, of the fifth class being 40 per cent, of Class A being 45 per cent, of Class B being 35 per cent, of Class C being 30 per cent, of Class D being 25 per cent and of Class E being 20 per cent.

The rates prescribed are maximum terminal rates and may be increased by five per centum for shipments between stations neither of which is a terminal or distributing station.

It appears from the evidence that the rates so prescribed for the first four classes apply alike to merchandise shipments in carload or in less than carload lots, but as to all the other classes they apply only to shipments in carload lots.

The reduction in merchandise rates made by the order of September 6, 1906, was from 20 per cent to 25 per cent, but notwithstanding the extent of the reduction all the railway companies interested put the rates prescribed by the order into effect on the 15th of November, 1906, and they ever since have been and still are maintained by all the companies concerned

as maximum rates for the transportation within the state of merchandise covered by the order."

Note.

Staples— 6 N. P. 2740.

"The same is also true with reference to the rates prescribed in the Commission's supplemental order of May 3, 1907, from and since its issuance, which supplemental order, in the Northern Pacific case, effected a reduction of 13.577 per cent in the rates upon the traffic affected by it. To what extent it affected traffic rates in the Great Northern case does not appear. In the Minneapolis & St. Louis case no relief is asked on account of it.

At the same time that the Commission was considering the schedule afterwards incorporated in its order of September 6, 1906, it was also considering a reduction in rates for transportation within the state of commodities in carload lots not covered by the order. Because of the agitation with regard to commodity rates, the three northern systems in the state, the Great Northern, the Northern Pacific and the Minneapolis, St. Paul and Sault Ste. Marie companies, voluntarily reduced their rates on grain approximately ten per cent by filing schedules effective September 1, 1906, and their rates on hard and soft coal at least ten per cent by filing schedules effective October 22, 1906.

Notwithstanding these voluntary reductions and the reduction caused by the order of September 6, 1906,

the Commission under date December 14, 1906, effective by its terms January 26, 1907, made its second order reducing rates for transportation within the state of grain, coal, lumber and livestock. The reduction effected averaged from 10 per cent to 28½ per cent or a general average of 17.37 per cent in addition to the voluntary reductions in rates on grain and coal made by the three northern systems as above recited."

Note.

Staples— 6 N. P. 2739-2741 :2752-3.

"In January, 1907, the railroad companies affected by this second order, being all that are parties defendant to the nine pending suits as above set forth, procured an injunction from the Circuit Court of the United States for the District of Minnesota forbidding the enforcement by the Commission of its second order. Thereupon the legislature of the state, which convened early in January, 1907, enacted Chapter 232, General Laws of Minnesota for the year 1907, approved April 18, 1907, and effective by its terms June 1, 1907, fixing a new schedule of commodity rates in all respects like the schedule comprehended in the second order of the Commission excepting that the reduction in rates provided by it was 10 per cent less than that provided by the order—a copy of which legislative enact-

ment is annexed as an exhibit to the bills of complaint, respectively."

Note.

Exhibit 4 to Amended and Supplemental Bill of Complaint— 1 N. P. 153.

"By Chapter 232 the legislature creates seven new classes, numbered respectively from 11 to 17. Wheat and thirteen other articles are placed in Class 11, corn and thirty-seven other articles in Class 12, lumber and five other articles in Class 13, sheep in double-decked cars and cattle in Class 14, sheep in single-decked cars and hogs in Class 15, hard coal in Class 16, and soft coal in Class 17. There is no fixed percentage relation between the classes and no regular rate of progression of the various rates with increasing distance. In other respects, however, the method of making the schedules is similar to that adopted by the Commission in its order of September 6, 1906. The hauling charge comprehended in the rates for each class decreases with increasing distance and becomes very small for the added mileage for distances between 300 and 400 miles, which is the limit of distance covered by the Act. On Class 11 the difference between the rate for 300 miles and that for 400 miles is 1.1 cents per cwt. amounting to 2.2 mills per ton per mile; on Class 12 the difference is one cent per cwt. or two mills per ton per mile; on Class 13 it is 2.2 cents per cwt. or 4.4 mills per ton per mile; on Class 14 it is 2.2 cents per cwt. of 4.4 mills per ton per mile; on Class 15

it is 1.5 cents per cwt. or three mills per ton per mile; on Class 16 it is 34 cents per ton or 3.4 mills per ton per mile; and on Class 17 it is 18 cents per ton or 1.8 mills per ton per mile.

The schedule of rates only applies to shipments in carload lots with minimum weights definitely fixed by the Act.

Meantime and at the same session of the legislature it had passed the so-called two cents passenger law, being an Act approved April 4, 1907, effective by its terms May 1, 1907, prescribing as maximum rates for the transportation of passengers within the state two cents per mile for passengers of twelve years of age or over together with baggage not exceeding 150 pounds in weight, and one cent per mile for passengers under twelve years of age together with baggage not exceeding 75 pounds in weight."

Note.

Exhibit 6 to Amended and Supplemental Bill of Complaint— 1 N. P. 162.

"The maximum theretofore had been three cents for adult passengers and 1½ cents for persons under twelve years of age.

The defendant railway companies published and put into effect the passenger rates prescribed by said Act on April 4, 1907, and were about to put into effect the commodity rates prescribed by said Act of April 18, 1907, and would have done so had they not been restrained by the writs of injunction issued in these

suits. They were apparently influenced in what they did and were about to do both with respect to the Commission's orders and the Acts of the legislature by the severe penalties denounced by the statutes, which, until their invalidity in this respect was judicially determined, as has since occurred, they feared might impose upon the officers thereof heavy fines and long imprisonments.

If said railway companies had refused to obey the orders of the Commission and the acts of the legislature aforesaid, or ceased to obey the same or either thereof, said Attorney General and said Commission were intending to take, and would have instituted proceedings, by mandamus or otherwise, against them and each of them and their respective officers and agents, to enforce obedience to said acts and orders, and said proceeings would have been so taken but for the injunctional orders issued herein.

Before the suits were brought the complainants in each of said cases demanded of the president and directors of the railroad companies of which they were respectively stockholders that they, said president and directors, cease obedience to and that they refuse to obey said respective orders and acts and each of them and that they forthwith institute proper legal proceedings to test the legality thereof. Said respective railway companies and said officers and agents thereof, respectively, refused compliance with said demands because of the aforesaid extreme fines and penalties denounced by the statutes in case such statutes shoul be held legal and operative as punishments for disobedience to said acts and orders.

It has been established by proper and sufficient proofs that complainants were qualified to bring these respective suits and that the Court has jurisdiction of the parties and of the subject matter thereof and that said suits are not nor are either or any of them in any manner or to any extent collusive to confer on the Court of the United States jurisdiction of a case or cases of which it could not otherwise have jurisdiction.

Summarized, the reductions in rates which may be charged by railroad companies for interstate transportation within the state of Minnesota so made by its legislature and commission and challenged by these suits are briefly as follows:

1. Reduction in maximum rates on general merchandise amounting to from 20 per cent to 25 per cent. (Commissioner's order of September 6, 1906.)

2. Reduction in maximum rates on passengers amounting to 33 1/3 per cent. (Session Laws of 1907, Chap. 176.)

3. Reduction in maximum rates on grain, lumber, live stock and coal amounting to 7.377 per cent. (Session Laws of 1907, Chap. 232.)

4. Reduction in in-rates in distributing stations amounting, in the Northern Pacific case, to 13.58 per cent. (Commission's order of May 3, 1907)

III.

Authority of Commission to Make Schedule of Rates.

It is earnestly insisted by complainants that the legislature has never conferred upon the Commission authority to make the orders complained of and that the railroad companies were under no legal compulsion to adopt the rates prescribed by them. It is

claimed that the extent of the Commission's power was to investigate and readjust particular rates upon complaint or its own motion on notice to the railroad companies to be affected, the investigation to be limited to the matter complained of, but that it was without anthority to make general and comprehensive schedules of rates covering all classes of merchandise and commodities upon all railroads and between all points in the state, and the case of *Siler v. Louisville & Nashville Railroad Company,* 213 U. S. 175, is confidently relied upon to support this position.

Were it not for the joint resolution of the legislature of April 6, 1905, before referred to, the case cited would seem to support complainants' contention. While it is conceded that such resolution has the force of law, they insist, however, that it authorizes the Commission only 'to undertake the work of securing a readjustment of the existing freight rates in this state which will give a more uniform system of rates throughout the state and a uniform schedule of percentage which each class rate shall bear to the first class, the readjustment to secure a substantial reduction in the existing merchandise rates,' and that this resolution simply contemplates the preparation of rate schedules in furtherance of the desired end therein expressed to be thereafter put in force by legislative enactment.

Authority to undertake a work without words of limitation includes the prosecution thereof until completion, and especially so in view of the language here used designating just what such work is to effect. The resolution clearly takes the case out of the operation of the law as declared in the case above cited.

It does not seem here material, however, aside from the question of interference, hereafter to be considered, whether the orders complained of are void or valid, provided the rates thereby prescribed are in fact just and reasonable. They have been actually adopted and regardless of the influences which may have led to their adoption, if they are reasonable in fact the complainants would have no standing in a court of equity in attempting to compel a return to excessive rates. If there had been no allegations in the bill that the merchandise rates prescribed by the Commission and put in by the railroad companies were unreasonable and confiscatory, it seems clear that as to such rates no case would be stated calling for the intervention of a court of equity. If put in with authority of the state legislature, as is here held, but are in contravention of the commerce clause of the Constitution or the Act of Congress and therefore unlawfully discriminate against interstate commerce, it is doubtless competent for the Court to adjudge their invalidity and compel the defendant company to return to its former rates or to such rates as shall prevent such discrimination—a matter to be hereafter determined. The cases of *Missouri, Kansas & Texas Railway Company, et al., v. Love*, 177 Fed. Rep. 493, and *In re Arkansas Railway Rates*, 163 Federal Reporter 141, suggest the propriety of such course.

IV.

Effect of Prescribed Rates if Confiscatory as to One Line of Railway and Not Another.

It has also been urged that if the prescribed rates or any of them are confiscatory as to any of the railroad companies it operates to invalidate such rates even as to those companies which would through them secure a reasonable return on their investment.

This contention was raised and denied in the Missouri rate case and should be followed regardless of the Master's views. He believes, however, that the question was there correctly decided. Whether invalid provisions in a law shall operate to invalidate the whole law turns upon the question as to whether the legislators would have enacted the law without such invalid provisions, or, in other words, whether the invalid provisions were a consideration for and influenced their action. If the legislators would probably not have acted at all if the invalid features of the law had been first eliminated, then the whole law falls, otherwise not. If, in the legislation here under consideration, a provision had been inserted that the same should not be operative as to any railroad company whenever the effect thereof would confiscate the property of such company, its validity could not be questioned on such ground. In view of the end sought, there can be no doubt that the insertion of the provision suggested, if deemed necessary for its validity, would have had no influence in preventing legislation in such form. The fact that the legislation would not be applicable to all cases within its terms would not for a moment have deterred the legislature in its ac-

tion along the lines taken by it. This objection must be overruled.

V.

Interference with Interstate Commerce.

A question of first importance is raised by the complainants in their contention that the prescribed rates discriminate against and operate as a regulation of interstate commerce, and a large amount of testimony has been offered by them bearing upon this phase of the cases. In their view upon the question so raised it is wholly immaterial whether the prescribed rates are reasonable or not. They contend that State-made rates must be made to conform to and not be relatively less than or unduly discriminate against interstate rates, and that the reasonableness of such interstate rates must be determined in the first instance by Congress or its administrative officers, the Interstate Commerce Commission, acting under the Interstate Commerce Statute.

The orders of the Minnesota Commission and acts of the legislature are strictly limited to state commerce, so far as the language used is concerned, and in terms have no reference to commerce without the state, nor do they apparently seek to control interstate rates. It has been held, however, that 'If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid whatever may have been the purpose for which it was enacted, and although the company may do both state and interstate business. Such is an established rule of constitutional construc-

tion, as the adjudged cases abundantly show.' (*Telegraph Co. v. Kansas,* 216 U. S. 1.)

It must be true that there cannot be a dual control in so important a regulation as the fixing of rates, the same being of vital importance to the continued existence of the company as a going concern, and if state and interstate rates must bear a certain relation to each other, the standard must be fixed by the sovereign power, the Congress, which under the Constitution is given power to regulate commerce among the states. A power enumerated in the Constitution, with all the incidents thereof, is supreme and cannot be in any manner limited by state action. Subject to such power, so conceded to Congress, all rights are reserved to the State, including the right to regulate its internal commerce. 'It needs no argument to show that the commerce with foreign nations and between the states, which consist in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by state legislation.' (*Gloucester Ferry Co. v. Pennsylvania,* 114 U. S. 196.)

'It is now settled in this court that a State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce.' (*Stone v. Farmers' Loan & Trust Co.,* 116 U. S. 307.)

In *Ames v. Union Pacific R. R. Co.* (64 Fed. Rep., p. 172), where this question seems to have been raised by counsel for the defendant, Mr. Justice Brewer said:

'Neither can I understand how the reduction of local rates, as a matter of law, interferes with interstate rates. It is true the companies may, for their own convenience, to secure business, or for any other reason, rearrange their interstate rates, and make them conform to the local rates prescribed by the Statute, but surely there is no legal compulsion. The Statute of the State does not work a change in interstate rates, any more than an Act of Congress prescribing interstate rates would legally work a change in local rates. Railroad companies cannot plead their own convenience, or the effects of competition between themselves and other companies, in restraint of the otherwise undeniable power of the State.'

On appeal, this statement of the law, not in form but in effect, is approved by Mr. Justice Harlan.

The matter of discrimination, in the instant cases made so prominent, does not seem to have been called to the attention of the Court, nor does there seem to have been any evidence in the case bearing upon the question. Here the complainants do not claim that 'as a matter of law' local rates necessarily interfere with interstate rates or that companies can 'plead their own convenience or the effect of competition between themselves and other companies in restraint of the otherwise undeniable power of the State.' What they do insist is that the evidence presented in these cases differentiates them from the Ames case and shows that the prescribed rates if observed are so far-

reaching in their effect as to compel disobedience to the inhibitions of the Interstate Commerce Act against discrimination, which in terms forbids a carrier 'to subject any particular * * * locality * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever,' and that such discrimination, enforced as it is by state action, if not denounced by the Act of Congress, is violative of the commerce clause of the Constitution, having in mind the purposes of such provision and the historical conditions giving rise to its adoption.

The State claims that the above section of the Federal Act referred to does not prohibit discrimination brought about in conducting state commerce because of the proviso appended to the first section of the act, as follows: 'Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, storage or handling of property wholly within one state and not shipped to or from a foreign country or to any state or territory, as aforesaid.'

Also because it is beyond the power of Congress under the Constitution of the United States to legislate as to or to regulate or prohibit the making of rates by a State as to transportation beginning and ending and wholly within the State.

This would seem to be in effect a declaration that the act is not intended to apply to any subject outside of Federal control. The primary purpose of the act, as has been repeatedly held, is to prevent discrimination, and it would seem to be a misconstruction of the proviso to hold that it authorized or permitted in its most vicious form that which in another form it so

strictly inhibits, especially in view of the fact that there can be no question of the competency of Congress to prevent discrimination between interstate localities. It certainly should not be construed as conferring upon a state power or permission to so regulate commerce within its borders as to hamper or be a burden upon interstate commerce and operate as an unrighteous discrimination against localities in other states. It was such discrimination which gave rise to the commerce clause of the Constitution and it is not to be supposed that Congress intended to give the carrier, or the State acting upon it, a free hand with respect to state commerce without regard to its effect upon commerce between the states. It could not do so if it would. A state has no right to burden interstate commerce for the benefit of its own business enterprises or to subject it to 'any undue or unreasonable prejudice or disadvantage in any respect whatsoever.'

'It is of the last importance that the freedom of interstate commerce shall not be trammeled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general rights of the states to regulate their strictly domestic affairs is fundamental in our constitutional system and vital to the integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the general government and not in hostility to rights secured by the supreme law of the land.' (*Western Union Telegraph Co. v. Kansas*, 216 U. S.)

That such burden may be imposed by state rate regulation is well illustrated in the case of *Saunders*

& Company v. Southern Express Company, decided by the Interstate Commerce Commission January 10, 1910, (Opinion No. 1278), where the facts showed that certain state rates put in by the Alabama Railroad Commission under legislative authority discriminated directly and substantially in favor of the City of Mobile, Alabama, against the City of Pensacola, Florida. In delivering its opinion the Commission says:

> 'The carriage of traffic by a common carrier for one community or one set of shippers at less than it carries the same traffic for a like distance, and under substantially similar transportation conditions, for another community or another set of shippers is not only in contravention of fundamental right and justice but is essentially iniquitous. If such a discrimination is practiced by a common carrier as between communities or different sets of shippers within the same state and on traffic moving only within the state, redress may usually be had under the state laws. On the other hand, if an interstate carrier is guilty of such a discrimination with respect to interstate traffic, redress may be had under the act to regulate commerce. But when a carrier, as in this case, serves two communities similarly situated, by hauling the same traffic under similar conditions from a point of origin to destinations in the same state and also to the same destinations from an interstate point of origin, it is not altogether clear that existing legislation affords redress against a discrimination, as between the two points when resulting from an order by the state commission. But unless some such power is lodged somewhere under appropriate legislation, it is evident that State-made rates, if established in pursuance of a narrow or selfish local policy, may not only hinder and harm and burden interstate traffic and interstate interests, but may, if adjusted with that end in view, take from a

point in another state a business that naturally belongs to that point or in which it is entitled at least to participate, on the basis of equal rates and equal opportunity. * * *

'The defendant is one concerned and one instrument of commerce operating through and across those invisible lines that separate the several states from one another. It has but one corps of officers and employees and but one equipment. Its only object is to serve all the shippers in the territory through which it passes. That object is legitimately effected only when it serves its whole constituent public upon substantially similar terms when the conditions are substantially similar. If it voluntarily makes a distinction between traffic that moves from a point in one state to a point in another state and traffic that moves between points in the same state, and gives to the state traffic lower rates than to the interstate traffic moving under substantially similar conditions, it imposes upon the latter a burden that it ought not justly to bear, and it discriminates against one community in favor of another. The same burden and discrimination follow if instead of voluntarily so adjusting its rates it is compelled so to adjust them by the action of a state commission. It may be that this anomaly in transportation necessarily results from our dual system of government and that a remedy is beyond reach without some amendment to the national constitution. On principle it is clear that a carrier operating through two or more states is but one vehicle of commerce, and all traffic moved by it, whether state or interstate, ought, when the general transportation conditions are the same, to bear its just proportion of the cost of operation and ought to yield no more and no less than its just proportion of the revenues of the carrier. Any other theory is fundamentally inequitable, illogical and unreasonable. It may be, but on that point we express no opinion, that the Congress may constitutionally

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protect interstate commerce, as well as the carriers that are engaged in interstate transportation, by requiring that any state traffic moved by such a carrier shall bear its just proportion of the cost of operation and yield its proper proportion of profit to the carrier; and that with such an end in view it may authorize this Commission to fix minimum rates, at least, for state traffic when moved by carriers engaged also in interstate transportation; or that it may provide that no carrier engaged in the interstate transportation of passengers or property may at the same time carry state traffic at rates that are less than the rates exacted by it for interstate carriage of like distance and under like transportation conditions. It has, however, not attempted any such legislation, and whether such an enactment would stand the test of scrutiny by the courts under the constitution as it now stands, and if so, whether it would be desirable from the standpoint of a broad public policy, are questions that must ultimately be determined by the legislative power and therefore cannot profitably be discussed by the Commission in this proceeding.'

The Commission were of opinion that the Federal law under which they derived their power did not justify them in interfering with the State-made rates although they found that they operated as a burden upon interstate traffic. In view of this finding it would seem to have been competent for the Commission to require the carrier to ignore the order of the State Commission on the ground that in its operation it violated the commerce clause of the Constitution. In a matter of so much doubt, however, it was a proper exercise of administrative discretion not to compel the carrier to disregard the State-made rate until its validity and their own power in the premises had been judicially determined, and especially is this true in

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view of the fact that in that case the State was not represented and the action of its commission would have been condemned without a hearing on the part of the State. In the cases before the Master, the validity of the prescribed rates is directly in question, not merely as a matter of legal construction, but upon voluminous evidence, with all interested parties present, and the force and effect of the Federal Act and of the commerce clause can be determined in the light of the facts disclosed by such evidence. The facts in this regard are as follows:

1. The Northern Pacific Railway Company is a corporation and is a common carrier owning, maintaining and operating lines of railway exclusive of lines in Manitoba and its interest in the Spokane, Portland & Seattle railroad comprehending on the 30th day of June, 1908, approximately 7,695.80 miles of track, of which 1,625.20 miles are in Minnesota. Its main line of railway extends from Superior, Wisconsin, and Duluth, Minnesota, which are situated side by side at the westerly end of Lake Superior, and from the cities of St. Paul and Minneapolis, Minnesota, in a westerly direction through the states of Minnesota, North Dakota, Montana, Idaho, Washington and Oregon to the cities of Seattle, Tacoma and Portland on the Pacific coast. Between Duluth and other points in Minnesota reached by it the company has both a local and an interstate line of railway, the interstate line passing through Wisconsin and joining the state line at Carlton, Minnesota, twenty miles westerly from Duluth. The Company has a branch line which leaves the main line at Manitoba Junction, 225 miles westerly from St. Paul, and extends in a north-

erly direction, leaving the state of Minnesota at East Grand Forks, Minnesota, 320 miles from St. Paul and entering the state of North Dakota at Grand Forks, North Dakota, which is at the same official distance from St. Paul, and running to Pembina, North Dakota, which is on the border line between North Dakota and Manitoba and is 414 miles from St. Paul. It has another branch line which leaves the main line at Wadena, Minnesota, 160 miles westerly from St. Paul, and extends in a westerly direction, leaving the state of Minnesota at Breckenridge, Minnesota, 237 miles from St. Paul, and entering the state of North Dakota at Wahpeton, North Dakota, 238 miles from St. Paul, and running thence to Oakes, North Dakota, 311 miles from St. Paul. The main line of the company leaves the state of Minnesota at Moorhead, Minnesota, 250 miles from St. Paul, and enters the state of North Dakota at Fargo, North Dakota, which is 251 miles from St. Paul."

Note.

Chas. F. Staples— 6 N. P. 2974.

"2. The Great Northern Railway Company is a corporation and is a common carrier owning, maintaining and operating lines of railway comprehending on the 30th day of June, 1908, 8,528.98 miles of track, of which 2,779.30 miles are in Minnesota. Its main lines of railway extend from Superior, Wisconsin, and Duluth, Minnesota, in a westerly direction through the states of Wisconsin, Minnesota, North Dakota, Mon-

tana, Idaho, Washington and Oregon to the cities of Seattle and Portland. Its line between Duluth, Minnesota, and other points in Minnesota reached by it passes through the state of Wisconsin. Between Minneapolis and Larimore, North Dakota, the Company has two main lines of Railway. One of these lines extends from Minneapolis by way of Willmar, Minnesota, leaving the state of Minnesota at Breckenridge, Minnesota, 214 miles from St. Paul, and entering the state of North Dakota at Wahpeton, North Dakota, 215 miles from St. Paul, and running thence to Larimore, 345 miles from St. Paul. The other of these lines extends from Minneapolis by way of Barnesville, Minnesota, leaving the state of Minnesota at Moorhead, Minnesota, 241 miles from St. Paul, and entering the state of North Dakota at Fargo, North Dakota, 242 miles from St. Paul, and running thence by way of Grand Forks, North Dakota, to Larimore, 348 miles from St. Paul.

The main line of the Company between Duluth and Larimore runs by way of Crookston, Minnesota, leaving the state of Minnesota at East Grand Forks, Minnesota, 296 miles from Duluth, and entering the state of North Dakota at Grand Forks, North Dakota, at the same official distance from Duluth, and running thence to Larimore, 325 miles from Duluth.

The Company has a branch line of railway wholly within the state of Minnesota which leaves the main line at Barnesville and extends northerly to Noyes, 391 miles from St. Paul.

It has another branch line which leaves the main line at Willmar and extends in a southwesterly direction, leaving the state of Minnesota at Jasper, Minne-

sota, 218 miles from St. Paul, and entering the state of South Dakota, and running by way of Sioux Falls, South Dakota, to Yankton, South Dakota, 311 miles from St. Paul, and to Sioux City, Iowa, 327 miles from St. Paul.

It has another branch line which leaves the Willmar main line at Benson and extends in a southwesterly direction, leaving the state of Minnesota at Nassau, Minnesota, 173 miles from St. Paul, and entering the state of South Dakota and running to Huron, South Dakota, 294 miles from St. Paul."

Note.

Chas. F. Staples— 6 N. P. 2974.
Complainants' Exhibit 39 Maguire—6 G. N.
A. G. Maguire— 3 G. N. 790-2.

"3. The Minneapolis and St. Louis Railroad Company is a corporation and is a common carrier owning, maintaining and operating lines of railroad comprehending on the 30th day of June, 1906 632.06 miles of track and operating under lease or trackage rights lines of railroad comprehending on the same date 396.43 miles of track. Its main lines of railway extend from St. Paul and Minneapolis, Minnesota, westerly by way of Winthrop, Minnesota, to Le Beau, South Dakota, from St. Paul and Minneapolis southwesterly by way of Winthrop, Minnesota, to Storm Lake, Iowa, and from St. Paul and Minneapolis south-

erly by way of Albert Lea, Minnesota, to Des Moines, Iowa."

Note.

Chas. F. Staples— 6 N. P. 2974
Complainants' Exhibit 2 Scott—6 M & St. L.
Complainants' Exhibit 3 Scott—6 M. & St. L.

"4. The whole of the railroad properties of each of said companies have for many years constituted and still constitute respective single systems and have been and are operated by each of said companies as such. The cars, engines and supplies of each company customarily have been and are used upon its system wherever required and without regard to whether the business in which they have been or are employed has been or is interstate business or business local to a state. It always has been and is impracticable and apparently is impossible to operate the property of either of said companies situate in any state separately or to carry on transportation of passengers or freight local to a state separately from interstate passengers or freight touching that state. Each of said companies customarily has carried and does carry interstate passengers and passengers local to a state on the same train and in the same car and interstate freight and freight local to a state on the same train and, if less-than-car-load freight, in the same car; and they could not and cannot practicably or in the exercise of any fair

economy whatsoever do otherwise. (See Maguire's testimony in G. N. Case, p. 797.)"

Note.

A. G. Maguire—	3 G. N. 797.
Howard Elliott—	4 N. P. pp. 1222-1226.
J. N. Tittemore—	2 M. & St. L. 92.

"5. By far the larger proportion of the business of each of said companies is interstate; and by far the larger proportion of the business of each of said companies within the state of Minnesota is interstate.

For example, for the year 1906, taken as a sample year in the testimony, the freight business of the Northern Pacific Company local to the state of Minnesota was but 2.67 per cent of the Company's entire freight business and but 12.33 per cent of the Company's freight business touching the state; its passenger business local to the state of Minnesota was but 5.79 per cent of its entire passenger business and but 67.21 per cent of its passenger business touching the state. (Ex. 54 Johnson.)"

Note.

Complainants' Exhibit 54 Johnson—10 N. P.
Complainants' Exhibit 80 Elliott—10 N. P.
Complainants' Exhibit 53 Ward—6 G. N.
Complainants' Exhibit 49 Martin—6 G. N.
Complainants' Exhibit 14A Tittemore—6 M. & St. L.
Complainants' Exhibit 33 Scott, A.—D.—6 M. & St. L.

"6. For many years the condition attending the transportation of passengers, of merchandise covered by the Order of September 6, 1906, or of commodities covered by Chap. 232, Gen. Laws 1907, have been and they still are substantially the same for like distances within those portions of the states of Wisconsin, Minnesota, North Dakota and South Dakota reached by the lines of railway operated by either of said companies; and whether such transportation has been or is of business local to a state, or interstate between any two of such states. (See Baird's testimony, N. P. Case, pp. 1436 to 1439, and pp. 1476-7; and Maguire's testimony, G. N. Case, pp. 792 to 795.)

Each of said companies had, prior to the taking effect of the Order of September 6, 1906, and the two-cents maximum passenger fare law, maintained an equable, that is, a relatively fair basis of rates for merchandise and passengers the transportation of which touched Minnesota without regard to whether the transportation was state or interstate between Minnesota and an adjoining state, and each of them still maintains such equable basis of rates for the transportation of commodities covered by Chap. 232, Gen. Laws 1907, regardless of whether it is local within Minnesota or interstate between Minnesota and an adjoining state.

Any substantial change in the basis of rates or in any particular rates due only to the fact that the transportation was interstate or that it was local to a state would have been actual, undue and unjust discrimination in fact; and any substantial difference in rates for the transportation of passengers, merchandise or commodities maintained by either of said companies as

between traffic local to the state of Minnesota and traffic which goes between the state of Minnesota and either of its neighboring states will constitute actual, undue and unjust discrimination in fact. (See N. P. Case, Elliott, p. 1320-1, and Baird, p. 2198-9.)"

Note.

J. B. Baird—	4 N. P. 1436-1439:1476-1481:2198-9.
Howard Elliott—	4 N. P. 1314-1315:1320-1:1402-1403.
Chas. F. Staples—	6 N. P. 2649-2650:2704:2871:2883-4:2891:2894-6:2904-5.
Allan L. Flinn—	6 N. P. 2424:2511.
A. G. Maguire—	3 G. N. 792-5:830-4:850-1:893.
A. M. Cleland—	4 N. P. 1601.
C. W. Tilton—	2 G. N. 756.
J. N. Tittemore—	2 M. & St. L. 104 et seq. 3 M. & St. L. 871 et seq.

"7. Superior, Wisconsin, and Duluth, Minnesota, are situated side by side at the western extremity of Lake Superior. Each is an important business center. Conditions attending transportation to and from either of them are the same as to or from the other. The railroad companies reaching them have always accorded them and do accord them like rates in and out. They ship and receive the same kinds of freight and to and from the same localities. Any substantial difference in the rates accorded them would destroy the commerce of the city given the higher rates. The

propriety of a parity of rates to and from these localities has always been recognized.

For the same reasons, each of the couples of cities composed of Grand Forks, North Dakota, and East Grand Forks, Minnesota, Fargo, North Dakota, and Moorhead, Minnesota, and Wahpeton, North Dakota, and Breckenridge, Minnesota, have always been accorded by the railway companies serving them like rates in and out. The cities in each pair depend upon the same carriers, have substantially the same producing and consuming markets and receive and ship the same kinds of articles. Any substantial difference in rates as between the cities composing each pair would seriously damage if not wholly destroy the commerce of the city given the higher rate and would be an undue and unjust disadvantage in fact to it and an undue and unjust preference and advantage in fact for its neighboring city. (See Baird's testimony, N. P. Case, p. 1456-8.)

Failure by the Northern Pacific Company to maintain substantially as low rates between Superior and points in Minnesota as between Duluth and other points in Minnesota would seriously impair the power of the Company to transact its interstate business between Superior and points in Minnesota, and would seriously depreciate the value of the Company's property in Superior."

Note.

Chas. F. Staples—	6 N. P. 2789-2790:2794-5: 2916-7.
J. B. Baird—	4 N. P. 1456-8:1474-5.
Allan L. Flinn—	6 N. P. 2421.
A. G. Maguire—	3 G. N. 838-9.
Howard Elliott—	4 N. P. 1419.

"8. The schedule comprehended within the Order of September 6, 1906, prescribed maximum rates for transportation within the state of Minnesota which were from 20 per cent to 25 per cent lower than those theretofore established by the Northern Pacific and Great Northern companies, and maintained by them up to the time of the taking effect of the Order for transportation in Wisconsin, Minnesota and North Dakota regardless of whether such transportation was local to either state or interstate between any two of them. If these companies after the installation of the rates prescribed by the Order for transportation within Minnesota had continued to maintain the former rates for transportation between Minnesota and an adjoining state, the result would have been serious discrimination against localities in the neighboring states.

For example, prior to the taking effect of the Order the rate maintained by the Northern Pacific on a 200-pound barrel of flour (fourth class) from Minneapolis to Fargo was 68 cents. The schedule fixed 54.2 cents as a maximum from Minneapolis to Moorhead. This is a fair example of the difference between the former interstate rates for transportation between Minnesota and an adjoining state and the rates prescribed by the

Order for transportation within the state. (Ex. 41 Baird.)

On the same day that the Northern Pacific Company installed its rates in Minnesota as prescribed by the Order, it reduced its interstate rates between Superior and points in Minnesota to an exact parity with its rates between Duluth and other points in Minnesota, its interstate rates between Grand Forks, Fargo and Wahpeton, North Dakota, and Minnesota points to an exact parity with its rates between East Grand Forks, Moorhead and Breckenridge, respectively, and other Minnesota points and its interstate rates between Superior and Grand Forks, Fargo and Wahpeton, respectively, to an exact parity with its state rates between Duluth and East Grand Forks, Moorhead and Breckenridge, respectively. The reduction was substantial. For example, the reduction in the rate on first class from Superior to Fargo was from 65 cents per cwt. to 54.1 cents per cwt.; and on fifth class from 27 cents to 21.7 cents per cwt. (Ex. 41 Baird.)

These reductions were compelled by the necessary and direct effect of the operation of the Order. Had they not been made, Superior could not have competed in business in Minnesota with Duluth; Fargo, Grand Forks and Wahpeton could not have competed with Moorhead, East Grand Forks and Breckenridge, respectively, nor could Superior have transacted business successfully with Fargo, Grand Forks or Wahpeton. Moreover, although the Northern Pacific suffered a substantial loss in revenue from its interstate business, it had the choice of submitting to that loss or of suffering substantial destruction of its interstate commerce in articles covered by the Order between these localities.

On the same day that the Northern Pacific made these reductions in its interstate rates the Great North-

ern made similar reductions although its business between Duluth and Minnesota points is interstate. The reason for its reductions from Duluth was to preserve the relation in rates from Duluth which had always existed between localities on the Great Northern and localities similarly circumstanced on the Northern Pacific, and also to meet the reduced rates on the Northern Pacific line. (Maguire, p. 815, G. N. Case.)"

Note.

Complainant's Exhibit 41, Baird, (10 N. P.)

J. B. Baird—	4 N. P. 1455:1460-4:1467.
Chas. F. Staples—	6 N. P. 2646.
A. G. Maguire—	3 G. N. 798-9:815:838-9.

"9. Moorhead, Minnesota, Fargo and Bismarck, North Dakota, Billings and Butte, Montana, are so-called "jobbing centers." Prior to the taking effect of the Order of September 6, 1906, they had always been accorded rates by the Northern Pacific Company which would allow them to compete in distribution of merchandise with their nearest neighbors and with St. Paul and Minneapolis and Duluth. The sum of carload rates from St. Paul, Minneapolis and Duluth to these centers and the less-than-carload rates out from these centers to the territory geographically tributary to them respectively had been such as to compare favorably with rates in and out of their local competitors as well as with less-than-carload rates from St. Paul, Minneapolis and Duluth into the territory geographically served by them respectively. The Order of September 6, 1906, as supplemented by the

Order of May 3, 1907, substantially reduced carload rates from Duluth, St. Paul and Minneapolis to Moorhead. This reduction would have given Moorhead a substantial advantage in territory accessible to its jobbing industry not only as against Fargo unless carload rates to Fargo shou'd have been similarly reduced, but also as against Duluth, St. Paul and Minneapolis unless less-than-carload rates from these points to points geographically accessible to Moorhead, which included a considerable territory in North Dakota, should have been proportionally reduced. This reduction unless accompanied by a corresponding reduction in carload rates to Fargo from the eastern terminals would have served to build up Moorhead at the expense of Fargo and therefore to discriminate unduly and unjustly against Fargo as a matter of fact, and would destroy the relation in rates which had theretofore existed between the sum of carload rates into Moorhead and less-than-carload distributing rates out on the one hand, and less-than-carload distributing rates from Duluth, St. Paul and Minneapolis to localities accessible to Moorhead on the other. If Fargo were protected against Moorhead by a like reduction in carload rates, it would have an advantage and preference over Bismarck in territory common to them both and an advantage over the eastern terminals in territory common to Fargo and them, unless carload rates from the eastern terminals to Bismarck and less-than-carload rates from the eastern terminals to the territory accessible to Fargo should be correspondingly reduced; and this advantage would constitute an undue and unjust preference to Fargo as against Bismarck, which competes in

certain territory with Fargo, unless rates on carload lots from the eastern terminals to Bismarck should be correspondingly reduced. And so on, from distributing point to distributing point."

Note.

J. B. Baird— 4 N. P. 1467-1473:1528-9.
Complainants' Exhibit 42 Baird, (10 N. P.).
Complainants' Exhibit 48 Baird, (10 N. P.).
Allan L. Flinn— 6 N. P. 2503, 2508.
Howard Elliott— 4 N. P. pp. 1319-23, 1380-5.

"10. Every rate comprehends two terminal charges, the initial and the final, and a distance haulage charge. It is a cardinal principle of rate-making that a rate for a longer distance should be proportionately smaller than one for a shorter distance; that is to say, that a rate for 500 miles should be less than twice the rate for 250 miles, if conditions of transportation be the same. Because the rate for 250 miles includes two terminal charges, and if the rate for 500 miles were twice the rate for 250 miles, it would manifestly include the equivalent of four terminal charges. Even if the haulage charge were the same per mile for a haul of 500 miles as for a haul of 250 miles, which is contrary to the rule generally applied in rate-making, the rate per ton per mile for the 500 miles should be less than for the 250 miles because in the one case the terminal charges would be spread over 500 miles and in the other over only 250 miles.

Comparison of rates at present maintained by the Northern Pacific Company from St. Paul to various stations in North Dakota and Montana with those established by the Order of September 6, 1906, and now maintained by the Company between St. Paul and Moorhead discloses that the Commission-made rates from St. Paul to Moorhead are in general substantially less than the proportion of the presently maintained interstate rates of the Company to these various points in North Dakota and Montana, based on the mileage in Minnesota as compared with that of the entire haul. For example, the present rate maintained by the Northern Pacific on Class E, merchandise from St. Paul to Miles City, 743 miles from St. Paul, is 39 cents per cwt.; the rate to Moorhead, based on the proportion of 39 cents, which the mileage of the haul in Minnesota is of the entire haul, is 13 cents. The Order allows only 11 cents per cwt. from St. Paul to Moorhead, in which of course are included two full terminal charges. Maintaining rates comparison of which shows this result, involves subtantial, undue and unjust discrimination in fact against the interstate localities. (Ex. 46, Baird, N. P. Case.)"

Note.

J. B. Baird—	4 N. P. 1491-2.
Complainants' Exhibit	46 Baird, (10 N. P.).
Allan L. Flinn—	6 N. P. 2505-8.
Chas. F. Staples—	6 N. P. 2880-2.

"11. After the installation by the Great Northern and the Northern Pacific companies of the rates pre-

scribed by the Order of September 6, 1906, it appeared that the sum of the locals from St. Paul to Moorhead and from Moorhead to many points in North Dakota was less than the theretofore established and maintained interstate rates from St. Paul to these points in North Dakota. Both companies thereupon established and now maintain rates from St. Paul to these North Dakota points as a rule no greater than the sum of the locals on Moorhead, but which are substantially lower in general than the interstate rates maintained by them at the time of the taking effect of the Order. Maintaining interstate rates from St. Paul to North Dakota localities substantially greater than the sum of the locals based on the state line would have involved undue and unjust discrimination in fact.

It was suggested on the trial by solicitors for defendants that these reductions were made by the companies upon complaint of merchants of St. Paul, Minneapolis and Duluth; but the uncontradicted testimony of the chief witness for the complainants on this point was that the reduction was made in order to protect the power of the railroads to do interstate business,—to remove the ability of the shippers to ship to Moorhead and trans-ship to the point of destination. As a matter of fact, the reasons for such reduction were to prevent trans-shipment at Moorhead in order to take advantage of the lower sum of the locals; to retain on its line traffic which was liable to reach Moorhead over other lines by reason of competition; and as to less-than-carload lots to enable jobbers in the Twin Cities and Duluth to compete with Moorhead and Fargo in territory which otherwise the latter would have exclusively occupied by reason of their closer

proximity thereto, an advantage to which it cannot be said such jobbers were entitled although they had been able theretofore to participate in such business."

Note.

J. B. Baird—	4 N. P. 1509.
Howard Elliott—	4 N. P. 1385:1404-5.
A. G. Maguire—	3 G. N. 789-9.

"12. It is one of the fundamental dogmas of rate-making that the haulage charge per mile shall not increase with increasing distance if conditions be the same. The Order of September 6, 1906, promulgates a schedule which for first class merchandise, for example, allows a terminal charge of 11.02 cents per cwt. and a haulage charge of .98 cent per five miles up to 200 miles, then a haulage charge of .98 cent per ten miles for added distance up to 400 miles, and then a haulage charge of .98 cent per twenty miles up to 500 miles—the limit of distance covered by the Order. Both the terminal charge and the haulage charge allowed for the other merchandise classes are a fixed percentage of those allowed for First. Under this schedule a hundred pounds of merch[illegible]se transported by the Northern Pacific from St. Paul to Moorhead, 248 miles, has been hauled for 48 miles, at the rate of .98 cent per ten miles when Moorhead is reached. If this same haulage charge of .98 cent per ten miles be applied for the remaining distance of the haul from St. Paul to Spokane, Washington, 1,510 miles from St. Paul (which is taken as a fair example merely for

the illustration of this principle), it would produce a rate from St. Paul to Spokane on First class merchandise of $1.79 per cwt. The Interstate Commerce Commission in the Spokane Rate Case has fixed the reasonable rate on First class merchandise from St. Paul to Spokane of $2.50. Maintaining this rate from St. Paul to Spokane and the Commission's schedule in Minnesota at the same time, necessarily involves the raising of the per mile haulage charge after the Minnesota state line has been crossed, or the charging a higher rate within Minnesota for its mileage proportion of long haul interstate business than for business local to the State carried on over the same rails and under the same conditions and involves necessarily undue and unjust discrimination in fact against localities westerly of the Minnesota-North Dakota boundary line. Defendants' solicitors, however, insist that in extending the State-made rate beyond the boundary line, if an equable basis is sought, the ton-mile charge for such extension must be found by dividing the total charge to such line by the distance to it from the point of origin, which would considerably increase the extension rate beyond the State line over the rate if extended by the method suggested by complainants. This method suggested by defendants is not the principle, however, on which the State schedule of rates is constructed, and even so it does not give traffic carried on the extended interstate rate the benefit of the spread of the two terminal expenses over the longer haul."

Note.

Order of Sept. 6, 1906, Exhibit 1 (and Exhibit A attached thereto), Amended and Supplemental Bill of Complaint— 1 N. P. 143-148.

J. B. Baird— 4 N. P. 1480-1495:1507 et seq.

Complainants' Exhibits 45 and 46 Baird—(10 N. P.).

Allan L. Flinn— 6 N. P. 2424:2494.

A. G. Maguire— 3 G. N. 805-7:894-5.

Chas. F. Staples— 6 N. P. 3037.

"13. For more than twenty-five years the Northern Pacific Company has maintained an equal basis of rates on merchandise between its eastern terminals and Butte and its western terminals and Butte and between its eastern terminals and localities intermediate between them and Butte and between its western terminals and localities intermediate between them and Butte. Other railroads reaching Butte have during the same time maintained like rates to Butte from Sioux City, Omaha, St. Joseph and Kansas City on the east, and from San Francisco, Sacramento and Los Angeles on the west. Butte has been as the hub of a wheel with spokes representing equal rates to these various cities. Industries have been born and have grown in reliance upon this parity of rates. Intermediate points have had rates fixed in proportion with the Butte rates Competition of markets and of carriers has brought this about. The Northern Pacific Company cannot maintain its present Commission-made rates between its eastern terminals and Moorhead and at the same time, its present interstate rates from its eastern terminals to Butte without substantial discrimination in

fact against Butte or localities intermediate between its eastern terminals and Butte. If it lowers its rates from its eastern terminals to Butte and intermediate stations to such an extent as to obviate substantial discrimination in fact, it must, to preserve the relation which has always existed, lower to a like extent its rates from its western terminals to Butte and intermediate stations. If, then, the Northern Pacific maintains the Commission-made rates between its eastern terminals and Moorhead it must either substantially discriminate in fact or destroy the general relation of rates which has existed for many years in the territory between the Missouri river and the Pacific coast."

Note.

J. B. Baird—	4 N. P. 1467-1473.
Complainants' Exhibit	42 Baird—(10 N. P.).
Howard Elliott—	4 N. P. pp. 1319-23, 1380-5.

"14. Prior to the taking effect of the Order of September 6, 1906, the Great Northern and Northern Pacific Companies had established joint through rates in connection with other carriers from all localities easterly or southerly of the state of Minnesota to all points in Minnesota westerly of St. Paul and Minneapolis reached by them respectively, and these rates were in force at the time of the taking effect of the Order. After the rates prescribed by the Order were installed, the sum of the locals on St. Paul from all localities southerly and easterly of Minnesota to all

localities in Minnesota westerly of St. Paul and Minneapolis reached by these companies was substantially less than the then existing interstate rates between such localities southerly or easterly of Minnesota and such Minnesota localities. Maintaining such a relation of rates would have involved undue and unjust discrimination in fact against the localities easterly and southerly of Minnesota and an unjust and undue preference and advantage in fact for St. Paul; because merchandise could have been shipped from all localities easterly and southerly of Minnesota to St. Paul on the theretofore established and then existing interstate rates and distributed from St. Paul to all points westerly of St. Paul and Minneapolis on the rates prescribed by the Order for substantially less charges in the aggregate than would have been incurred for the through haul under the then existing through interstate rates. In order to avoid this discrimination the companies forthwith after the taking effect of the Order withdrew the then existing interstate rates and established a new tariff of through rates which were no higher than the sum of the locals on St. Paul. For example, the former through rates from Chicago to Wadena, Minn., on First class merchandise was $1.09 per cwt. The sum of the locals on St. Paul after the taking effect of the Order was $1.004. The present through rate is $1.004, being a reduction of 8.6 cents per cwt. (Ex. 44 Maguire, pp. 818-20, G. N. Case.)"

Note.

A. G. Maguire— 3 G. N. 818-820.
Complainants' Exhibit 44 Maguire—(6 G. N.).

"15. The proof is clear that conditions attending transportation are substantially the same in Minnesota and North Dakota and whether the transportation is local to either state or interstate between them. If unjust and undue preference or advantage in rates is to be avoided, like rates must exist for like distances under like circumstances. The Northern Pacific and Great Northern Companies have, prior to the taking effect of the Order, maintained an equable basis of rates in the territory which these two states compose without regard to state lines. For example, the interstate rates from Moorhead, Minnesota, westerly into North Dakota have been the same as from Moorhead easterly into Minnesota and no conditions have existed or do exist which justify a different basis of rates for eastbound to that for westbound transportation.

Prior to the installation of the rates prescribed by the Order the rate per cwt. of First Class merchandise for 100 miles, for example, out of Moorhead, whether westerly into North Dakota or easterly into Minnesota, was 43 cents. For transportation westwardly into North Dakota this rate from Moorhead still exists. The rate prescribed by the Order and now in effect from Moorhead eastwardly into Minnesota is per cwt. of First Class merchandise 30.6 cents. This disparity of rates for transportation under substantially similar conditions and which disparity increases as distance easterly from Moorhead increases

constitutes an undue preference and advantage to the eastwardly localities in Minnesota and a corresponding prejudice and disadvantage to the interstate westwardly localities in North Dakota. If the Companies maintaining this relation of rates, unfair in fact, are to continue to maintain the rates prescribed by the Order, they can remove the existing undue and unjust discrimination in fact against the interstate localities in North Dakota only by reducing the interstate rates from Moorhead to localities in North Dakota to a substantial parity with those maintained from Moorhead to localities at like distance in Minnesota. (Ex. 35 Baird, N. P. Case.)"

Note.

J. B. Baird— 4 N. P. 1435-1444.
Complainant's Exhibit 35 Baird, (10 N. P.).
A. G. Maguire— 3 G. N. 850-1.

"16. The Great Northern Company owns and operates a branch line to Noyes, 391 miles from St. Paul. The line between St. Paul and Noyes is wholly within the state of Minnesota. Conditions attending transportation of merchandise from St. Paul to Noyes are at least no more favorable than those attending transportation from St. Paul to localities in North Dakota on the main line of the Company and equally distant from St. Paul. All that is claimed by complainants is that conditions are substantially alike. Prior to the taking effect of the Order the

rate per cwt. of First Class merchandise for transportation on the Great Northern from St. Paul to a locality 390 miles distant and situate either in Minnesota or in North Dakota was 96 cents. The Commission-made rate from St. Paul to Noyes is 68.8 cents. Such a disparity in rates without substantial dissimilarity in conditions constitutes undue and unjust discrimination in fact. (Ex. 46 Maguire; testimony, Printed Record, p. 796, G. N. Case.)"

Note.

A. G. Maguire— 3 G. N. 795-7.
Complainant's Exhibit 46 Maguire.

"17. The Order of September 6, 1906, prescribes a basis of rate-making. Its schedule is framed to secure a fixed relation between rates on the same class for different distances, a fixed relation between rates for the different classes for the same distance, and therefore manifestly a fixed relation between rates for different classes for different distances. These relations are so stable that, given the rate for any distance on any class, the rate for any other distance on any other class may be determined by one who knows the method upon which the schedule is constructed. An avowed purpose of the schedule is to secure equality of rates.

The Great Northern Company operates a line from St. Paul to Sioux City, Iowa, 327 miles from St. Paul, which leaves the state of Minnesota and enters

the state of South Dakota at a distance approximately 218 miles from St. Paul—the distance from St. Paul to Jasper, the border Minnesota town.

It operates another line from St. Paul to Huron, South Dakota, 294 miles from St. Paul, which leaves the state of Minnesota and enters the state of South Dakota at a distance approximately 173 miles from St. Paul—the distance from St. Paul of Nassau, the border Minnesota town. Between St. Paul and Willmar, Minnesota, 102 miles from St. Paul, these lines are identical.

Under the schedule prescribed in the Order, the progression of the rate—the haulage charge with increasing distance—breaks in two at a distance of 200 miles. That is to say, the haulage charge for First Class (and for other classes in fixed relation) having been allowed at .98 cent for each five miles up to 200 miles is cut to .98 cent for each ten miles beyond 200 miles and up to 400 miles.

When the line between Minnesota and South Dakota is reached on the St. Paul-Sioux City line, the progression of the rate prescribed by the schedule is .98 cent per ten miles for First Class.

When the line between Minnesota and South Dakota is reached on the St. Paul-Huron line, the progression of the rate is .98 cent per five miles of haul.

It is apparent that unless undue and unjust discrimination shall exist in the rates on one of these interstate lines as compared with the other, the same basis of making the rate, the same relation between rates for different distances and different classes must be maintained on one line as on the other, and that notwithstanding that the 200-mile point of distance

on the St. Paul-Huron line is within the state of South Dakota, the progression of the rate should break in two as it has on the St. Paul-Sioux City line on which that point was reached and that break was made within the state of Minnesota.

The schedule prescribes fixed relations between rates for different distances and different classes. If the relation must be adhered to within the state of Minnesota, it cannot be departed from substantially merely because of the intervention of a state line at one distance or another without involving undue and unjust discrimination in fact in rates. (See Maguire's testimony in G. N. Case, p. 795-6.)"

Note.

Complainants' Exhibit 39 Maguire—(6 G. N.).
A. G. Maguire— 3 G. N. 790-6.

"18. Since the taking effect of the Order of September 6, 1906, both the Great Northern and the Northern Pacific Companies have reduced their interstate rates on merchandise from their eastern terminals in Wisconsin and Minnesota to all localities in general in North Dakota. Such reductions have been made as a rule only to such extent as was necessary to remedy the discrimination resulting from the fact that the sum of the local rates from the eastern terminals to the border towns of Minnesota and from such border towns to the several localities in North Dakota was less than the theretofore established and then existing through interstate rates from the eastern terminals to the sev-

eral respective localities in North Dakota and not to such extent as to remedy the discrimination resulting from the fact that in most cases the general basis of rates on merchandise for traffic within Minnesota is substantially lower than that maintained in North Dakota or for traffic crossing the line between North Dakota and Minnesota notwithstanding the substantial equality of conditions. Such substantially lower basis of rates for transportation of merchandise within Minnesota than for that within North Dakota or for that between the two states still exists and constitutes undue and unjust discrimination in fact. Complaints have been made to the companies of the existence of this discrimination. [Baird (N. P. Case) 1540-1; 1467; 1523; 1527; 1464; 1507; Elliott (N. P. Case) 1384; 1385; 1404; Maguire (G. N. Case) 794; 832; 841; 798; 799.]"

Note.

J. B. Baird—	4 N. P. 1464:1467:1507: 1523:1527:1540-1.
Howard Elliott—	4 N. P. 1384-5:1404.
A. G. Maguire—	3 G. N. 794-9:832:841.

"19. St. Cloud, Minnesota, is on the Barnesville main line of the Great Northern and is 168 miles easterly from Moorhead, at which point this line leaves the state of Minnesota and enters the state of North Dakota. Fergus Falls, Minnesota, is on the same line, 56 miles easterly from Moorhead. They are each distributing centers, so declared by the Commission's Order of May 3, 1907. Whether discrimination in

fact exists between rates is determined by comparison of the rates involved. If conditions are substantially the same, rates for like distances should be the same, and if not the same, undue and unjust discrimination in fact will exist. Conditions are substantially alike so far as transportation goes for a distance on the Great Northern of 168 miles westerly of Fergus Falls as for the same distance westerly of St. Cloud. Because they are distributing rates from Fergus Falls to points within that distance westerly should be the same as from St. Cloud to points of equal distance westerly. Rates on articles covered by the Order of September 6, 1906, from St. Cloud westerly within such distance of 168 miles are substantially lower than those maintained by the Great Northern to points in North Dakota of like distance westerly of Fergus Falls. Such disparity depends only on the fact that in the case of the higher rates the state boundary line is crossed and on no other condition whatsoever; and it constitutes undue and unjust discrimination in fact not only against the shipper at Fergus Falls, but, as well, against the consumer in the North Dakota towns in question."

"20. The main lines and branches of the Northern Pacific and Great Northern Companies within the states of Minnesota and North Dakota lie (wholly, excepting certain limited tracks in which grain cannot be grown—such as the Bad Lands of North Dakota) within grain fields; and grain is shipped in substantial quantities from nearly all stations in these fields to Duluth, Minneapolis and Superior.

Shipments of coal originate at the Head of the Lakes, that is to say, Duluth, Minnesota, or Superior, Wisconsin, and find their destination at all localities

served by the Companies or either of them in Minnesota and eastern North Dakota.

Shipments of lumber originate at Duluth, Cloquet, Little Falls and other points in Minnesota and are destined to points throughout Minnesota and North Dakota.

Shipments of live stock originate in Minnesota, North Dakota and eastern Montana and go to South St. Paul or Chicago.

Conditions attending transportation are substantially the same as to all these commodities moving eastwardly, whether the shipment originates in Montana, North Dakota or Minnesota or whether it finds its termination at one of the Minnesota terminals of the Companies or at Superior, Wisconsin.

Conditions attending transportation are substantially the same as to all these commodities moving westwardly whether the shipment originates at a Minnesota point or at Superior, Wisconsin, or whether it finds its destination in Minnesota or North Dakota.

Because conditions attending transportation are substantially the same, any difference in the basis of rates charged for transportation of coal whether the shipment originates at Duluth, Minnesota, or at Superior, Wisconsin, and is destined to any locality in Minnesota or in eastern North Dakota, or in the basis of rates for transportation of grain, whether the shipment originates in Minnesota or North Dakota or is destined to Minneapolis or Duluth or Superior, or in the basis of rates for transportation of lumber whether the shipment is destined to a point in Minnesota or to one in North Dakota, or in the basis of rates for the transportation of live stock whether the shipment originates

in Minnesota, North Dakota or eastern Montana involves an undue and unjust prejudice and disadvantage in fact against the localities subject to the higher basis of rates and an undue and unjust preference and advantage in fact to the localities given the lower basis. Establishing the rates prescribed by Chapter 232, Gen. Laws 1907, and maintaining these rates for transportation wholly within Minnesota simultaneously with the maintenance of the interstate rates at present maintained for interstate traffic between Superior and localities in Minnesota, North Dakota and eastern Montana and between localities in Minnesota and localities in North Dakota and eastern Montana would involve on the part of the Northern Pacific and Great Northern Companies undue and unjust discrimination in fact against shippers, receivers and localities transacting the interstate business and would seriously impair the interstate business of the carriers. If the Companies shall be compelled to maintain within Minnesota the rates prescribed by Chapter 232, they will be compelled to reduce the basis of their interstate rates between eastern Montana and North Dakota points and Minnesota points and between eastern Montana, North Dakota and Minnesota points and Superior to a substantial parity with the basis prescribed by Chapter 232 in order to avoid undue and unjust prejudice and disadvantage in fact against shippers and localities transacting the interstate business as well as in order to protect the interstate business of carriers against serious impairment.

Such reduction must be substantial. For example, the present rate on soft coal from Duluth to Wahpeton is $2 per ton. The rate prescribed by Chapter 232

from Duluth to Breckenridge is $1.31 per ton. That act provides that a minimum carload of soft coal shall be 30,000 pounds or 15 tons. So that the reduction that will be necessary to avoid discrimination against the interstate locality in the rate on soft coal will be $10.35 per minimum carload."

Note.

Complainant's Exhibits 43 and 44 Baird, (10 N. P.).
J. B. Baird— 4 N. P. 1435-9:1460:1480-1495.
Exhibit 4, being Chapter 232, Commodity Rates.
Amended and Supplemental Bill of Complaint—
1 N. P. 153.
See citations supra, sub Finding 6.

"21. Duluth, Minnesota, Superior, Ashland, Green Bay, Manitowoc, Sheboygan and Milwaukee, Wisconsin, Gladstone, Michigan, Chicago, Illinois, the Peoria, Illinois, district, the Springfield, Illinois, district, the Streator, Illinois, district, and the LaSalle, Illinois, district, are all competitive points for the distribution of coal into the state of Minnesota.

For many years rates on coal from the various distributing points to localities in southern Minnesota have born such a relation as to admit of free competition of the various distributing points and of the carriers serving them.

If the rates on coal prescribed by Chapter 232, Gen. Laws 1907, shall take effect, the result will be substantial reduction in rates on coal from Duluth to southern Minnesota localities. Such a reduction will

deprive all these various distributing points in Wisconsin, Michigan and Illinois of their power to compete with Duluth in its distribution of coal in Minnesota unless the carriers serving them shall reduce their interstate rates into Minnesota to a parity with those prescribed by Chapter 232, from Duluth. If such carriers shall reduce their interstate rates in Minnesota to a parity with the rates prescribed by Chapter 232, the relation which now exists between rates on coal from these various distributing points and localities in northern Iowa and in South Dakota will be destroyed unless rates shall be similarly reduced from these various distributing centers to localities in these two districts."

Note.

A. G. Maguire— 3 G. N. 799-803.
Complainant's Exhibit 40, Maguire, (6 G. N.).
J. N. Tittemore— 3 M. & St. L., 899-909.

"22. Interstate rates on cattle, hogs, sheep and coarse grain would be affected by the rates prescribed by Chapter 232 in the same manner as has been found with regard to rates on wheat and coal."

Note.

A. G. Maguire— 3 G. N. 804.
Complainants' Exhibit 41, Maguire—(6 G. N.).
J. N. Tittemore— 3 M. & St. L. 960-4.
Citations sub Finding 20, supra.

"23. Under the milling-in-transit privileges, so-called, owners of wheat at any point in Minnesota, North Dakota or South Dakota may pay rates equal to the sum of the rate between the point of shipment to Minneapolis and the proportional rate from Minneapolis to Chicago (for many years and at present the sum of 7.5 cents per cwt.), have it milled at Minneapolis and within a limited period of time forwarded to Chicago as flour.

In order to allow mills located at other towns in Minnesota to compete with Minneapolis a like milling-in-transit privilege has been accorded owners of wheat to ship *via* such other towns as *via* Minneapolis; and mills have been established in many such towns under a guaranty that rates into the towns in which such mills are located on wheat in and flour out to Chicago should not exceed the rates from the same points to Chicago *via* Minneapolis with the milling-in-transit privilege. Chapter 232, Gen. Laws 1907, substantially reduces rates on wheat within Minnesota. The result will be, if that law takes effect, that the milling-in-transit rate from points in Minnesota *via* Minneapolis to Chicago will be automatically reduced substantially. Unless then all interstate rates between Minnesota points and Chicago *via* some interior mill town and with a milling-in-transit privilege shall be reduced to a substantial parity with the reduced milling-in-transit rate to Chicago *via* Minneapolis, Minneapolis will have a substantial advantage in its interstate rates on wheat over the various mill towns in the interior of the state

and wheat in general will as a result of this advantage go to Minneapolis."

Note.

J. N. Tittemore— 3 M. & St. L. 871 et seq.

"24. Prior to the taking effect of Chapter 97, Gen. Laws, 1907, the general basis of rates for the transportation of passengers between any two points on the Northern Pacific System had been for some years three cents per mile for passengers of twelve years of age and over, and one and one-half cents per mile for passengers under twelve years of age.

Chapter 97, Gen. Laws 1907, prescribes as a maximum for transportation of passengers wholly within the state of Minnesota two cents per mile for passengers of twelve years of age or over and one cent per mile for passengers under twelve years of age.

After the maximum rates prescribed by Chapter 97 were installed, the sum of the locals between Moorhead and other Minnesota points and Moorhead and points westerly thereof was less than the then existing interstate rates between Minnesota points and points westerly thereof.

The result of this disparity between the through interstate rate over Moorhead and the sum of the locals over Moorhead was this: In the first month after the taking effect of Chapter 97 the revenue for passenger business on the Northern Pacific between Moorhead and other Minnesota points increased 647 per cent over that for the corresponding month of the preceding

year, while, eliminating Moorhead business, the revenue for passenger business within the state decreased 2 per cent. In June, 1907, the second month after the taking effect of Chapter 97 there were sold by the Northern Pacific Company 4037 tickets between St. Paul or Minneapolis on the one hand and Moorhead or East Grand Forks on the other as compared with only 172 such tickets in the corresponding month of the year before; and in June, 1907, there were sold only 173 tickets between St. Paul or Minneapolis on the one hand and Grand Forks and Fargo on the other as compared with 984 such tickets in the corresponding month of the year before. In May and June, 1906, only one cash fare was collected on a train between Moorhead and St. Paul or Minneapolis; in those months in 1907 there were 1168 full cash fares and 82 cash half-fares so collected.

These facts compel the conclusion that the necessary, immediate, direct effect of the operation of Chapter 97 was to deprive the Northern Pacific Company of a substantial amount of its interstate passenger business through Moorhead."

Note.

A. M. Cleland— 4 N. P. 1601-3:1605:1609-1612:1672-8.

Complainant's Exhibits Cleland 49, 50, and 51—(10 N. P.).

C. W. Tilton— 2 G. N. 751:760-775.

Howard Elliott— 4 N. P. 1385-6.

"25. Notwithstanding the facility with which interstate passengers could avoid the discrimination against them by making two contracts with the Company, one of which should cover the mileage in Minnesota, discrimination in fact against the interstate passenger through Moorhead on the Northern Pacific still existed and was practiced. It existed against a passenger who, applying for a through ticket did not know that the sum of the locals on Moorhead was less than the through rate, against the passenger with a trunk which he could not check through unless on a through ticket, against a passenger who was compelled to use a sleeping-car.

As soon as it reasonably could do so the Northern Pacific remedied this discrimination by reducing all its interstate fares for passenger transportation through Moorhead to an amount no greater than the sum of the locals over Moorhead. Meantime and before tariffs establishing the new reduced interstate rates over Moorhead had been filed, the state of Wisconsin had enacted a two cent per mile passenger fare law, and the state of North Dakota a two and one-half cents per mile law. The rates, therefore, newly established by the Northern Pacific Company between St. Paul, for example, and points in North Dakota and beyond, were in general less than the theretofore existing rates by approximately one cent per mile for the mileage of the transportation in Minnesota and one-half cent per mile for the mileage in North Dakota. And the rates newly established by the Northern Pacific Company jointly with other companies for passenger transportation between points easterly of Minnesota and points on the line of the Northern Pacific were in general less

than the theretofore existing rates by approximately one cent per mile for the mileage of the transportation in Wisconsin and Minnesota and one-half cent per mile for the mileage in North Dakota.

These reductions in rates were compelled by the necessary, immediate and direct effect of the operation of the laws of the respective states above recited, not only in order that undue and unjust discrimination in rates might be avoided, but, as well, in order that the companies might transact interstate passenger business freely and without impairment of volume."

Note.

Chas. F. Staples— 6 N. P. 2898-2900.
A. M. Cleland— 4 N. P. 1614-1622:1632-4.
Complainant's Exhibits 52 and 53 Cleland—(10 N. P.).

"26. Prior to the taking effect of the respective orders complained of and of the two cents maximum passenger fare law, the tariffs of the Great Northern and Northern Pacific Companies for the transportation of passengers or merchandise in Wisconsin, Minnesota, North Dakota and South Dakota were fair as between the different states, and the local tariffs in each state were fair as compared with the interstate tariffs between such states or any two thereof; and the tariffs now maintained by the Companies and each of them for the transportation of commodities covered by Chapter 232 are fair as between these states, and the local tariffs in each state are fair as compared with the

interstate tariffs between such states or any two thereof.

The installation of the rates prescribed by the respective Orders destroyed that fairness as to merchandise rates, the installation of the two cents passenger rate destroyed it as to passenger rates, and the installation of the rates prescribed by Chapter 232 would destroy it as to rates on commodities covered by it."

Note.

See Citations Supra.
L. G. Scott— 2 M. & St. L. 18.
Complainant's Exhibit 13, Scott—6 M. & St. L.
Complainant's Exhibits 54, 55, 56, 57, 58 and 59 Johnson—(10 N. P.).
W. G. Johnson— 4 N. P. 1659-1677.
C. W. Tilton— 2 G. N. 759-771.
Complainant's Exhibits 38 and 39, Tilton—(6 G. N.).
Howard Elliott— 4 N. P. pp. 1383-6.

"27. It is wholly impossible for carriers situated as are the Great Northern, Northern Pacific and Minneapolis & St. Louis companies to maintain materially lower rates or a materially lower basis of rates or a different classification of subjects of transportation, or a different relation between rates for different classes of merchandise, for traffic wholly within Minnesota than for that between Minnesota and any of its neighboring states without unjust and undue discrimination in fact against the localities in the neighboring states, and without serious impairment of the volume of the interstate business of the carriers. Such lower basis

of rates within Minnesota than between Minnesota and its neighboring states would result in the promotion of the growth and prosperity of localities in Minnesota at the expense of localities in neighboring states and the enhancement of the value of property in Minnesota and the serious impairment of the value of the property of all business men as well as of that of the carriers themselves in the neighboring states."

Note.

Citations supra.

"28. Duluth and Superior, Grand Forks and East Grand Forks, Fargo and Moorhead, and Wahpeton and Breckenridge are so situated that each pair must be considered for the purpose of rate-making as one locality. Both as a practical matter of the operation of a railroad and in order that undue and unjust discrimination as between the members of any pair may be avoided, each city of each pair must have rates equal to those accorded to the other city. If different rates, a different classification or a different basis of rates be lawfully prescribed by one regulating power in or out of one city of any pair to those prescribed by another regulating power in or out of the other city of the pair, the carriers serving them both must, in order to avoid undue and unjust discrimination in fact as between them as well as to preserve their own power to transact business with each of them, adopt for each city the lower rates or basis of rates, or classi-

fication prescribed for either city. (As bearing generally upon the foregoing findings, numbered 1 to 28, relating to the question of interference, see testimony of Staples, (N. P. Case) pp. 2646, 2649, 2650, 2704-2790, 2891, 2916)."

Note.

See Citations under Findings 6, 7, 8, 20, 24, 25 and 26 supra.

"29. If it shall be necessary for the companies involved in order that discrimination may be avoided, or in order that the companies may preserve the volume of their respective businesses in interstate transportation free from impairment in volume, to install for their interstate business a basis of rates no higher than these respectively prescribed in the Act and Order complained of, and to extend the rates for their interstate long-haul business upon the principal provided in said Act and Order, the result will be a substantial diminution in the revenues of the companies from their interstate business. For example, the diminution in the revenue of the Northern Pacific Company for the year ending June 30, 1906, the last fiscal year prior to the taking effect of the Order of September 6, 1906, from its interstate business in transportation of commodities covered by Chapter 232 alone, if the basis prescribed by Chapter 232 had been applied to its rates for such interstate business, would have been $4,193,-283.04; and the loss in such interstate revenue for such year for transportation of merchandise covered by the

Order of September 6, 1906, if the basis prescribed by the Order had been applied to its rates for such interstate business, would have been $4,119,761.96. The loss in its interstate business from passenger transportation, if the two cents maximum rate had been applied during such year, would have been $1,444,955.35, or a total loss, on account of the Acts and Orders complained of, of $9,758,000.35.

If, in order to prevent discrimination as between different states, it shall be necessary for the companies involved to apply for local business within the respective states, the same basis of rates as those prescribed for business local to Minnesota by the Acts and Orders respectively complained of, the loss in revenue to the companies involved will be substantial. For example, in the year 1906 the loss in revenue of the Northern Pacific Company, if the basis prescribed by Chapter 232 had been applied to its local business in transportation of commodities covered thereby in other states, would have been $198,540.51; and its loss in revenue, if the basis of rates prescribed in the Order of September 6, 1906, had been applied to its local business in other states for transportation of merchandise covered thereby, would have been $952,644.83, or a total loss on freight of $1,151,185.34; and if the two cents maximum passenger rate had been applied to its local business in other states, the loss in revenue would have been $990,908.82, or a total loss, under the Acts and Orders complained of, of $2,142,094.16."

"The foregoing findings of facts with respect to the effects of the prescribed rates upon interstate traffic, established as they are by convincing and undisputed testimony and supported by the records and papers of the

respective companies, are made without regard to the justness or otherwise in fact of the interstate rates so affected by such local rates, and as this can be determined only by Congress or its administrative agent the Interstate Commerce Commission, subject of course to the power of the Court in a proper case to prevent confiscation or extortion, this Court cannot. in this suit, determine the reasonableness or otherwise of such interstate rates. Before it can take cognizance thereof the question must have been presented to and passed upon by the proper Federal tribunal created for that purpose. Until then, as they are legal, they must be accepted as reasonable and the State can take no action which will compel a modification thereof as a condition of doing interstate business.

Interference with interstate commerce arises from the fact that to prevent discrimination the rates must be modified so as to correspond substantially with the State-made rates and from the further fact that interstate commerce cannot in general be maintained at all unless they are so modified. It was directly held in *Louisville & Nashville Railway Co. v. Eubank,* 184 U. S. 27, that the carrier cannot be compelled to adjust its interstate rates with reference to State-made rates, and since they must harmonize to prevent unjust discrimination and to enable the carrier to retain its interstate business, the State in its regulation of rates must do so with reference to their effect upon interstate commerce.

The facts as found establish conclusively that the State in the rates prescribed by it has not kept within the limitations imposed upon it and has exceeded its constitutional powers in that such rates constitute a

direct interference with and impose a burden upon interstate commerce and effect unjust discrimination as between interstate localities.

If when this case was in the Supreme Court, and on the record then before it the Court could say with reference to the claim of interference then made that "The question is not, at any rate, frivolous," it would seem that on the facts here found to exist a conclusion that the prescribed rates operated as a direct interference with and a burden upon interstate commerce must be inevitable. It follows that the relief sought in these several suits must be granted.

The question as to whether the orders of the state commission and the acts of the legislature complained of constitute such an interference with interstate commerce and operate as a burden thereon by reason of the matters of fact hereinbefore found to exist is, however, not altogether free from doubt, and it is proper, therefore, regardless of the views of the Master, that he should proceed to make findings upon all the issues in the case."

VI.

"Valuations of Property Devoted to Public Service.

In determining the remaining issues in the case, the initial step is to ascertain and determine the value of the property devoted to the public service and upon what basis such valuation should be made. In the leading case of *Smyth v. Ames,* 169 U. S. 522, adhered to and constantly cited in every rate case since coming before the courts, the following language is used:

'It cannot be assumed that any railroad corporation, accepting franchises, rights and privileges at the hands of the public, ever supposed that it acquired, or that it was intended to grant to it the power to construct and maintain a public highway simply for its benefit, without regard to the rights of the public. But it is equally true that the corporation performing such public services and the people financially interested in its business and affairs have rights that may not be invaded by legislative enactment in disregard of the fundamental guarantees for the protection of property. The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it.

* * * * * *

'We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no

more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.'

Here we have a clear declaration that a corporation performing a public service cannot be required to use its property for the benefit of the public without receiving just compensation therefor, not *some* compensation but just and reasonable compensation, based upon the value of such property. There are, of course, exceptions to this rule. Under no circumstances can the rates be excessive, extortionate or unreasonable. They must be just to the public as well as to the carrier. If the road was unwisely conceived, unfavorably located and not constructed in response to public demand, a return upon such value is not to be expected if it compels unjust rates. But no conditions exist in these cases to take them out of the general rule.

It also appears from this and subsequent cases that it is the present value of the property which is to be taken as a basis of rates. As again stated by the same Court in *Wilcox v. Consolidated Gas Company,* 212 U. S. 19: 'There must be a fair return upon the reasonable value of the property at the time it is being used for the public * * * and we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding rates. If the property which legally enters into the consideration of the question of rates has increased in value since it was acquired, the company is entitled to the benefit of such increase. This is, at any rate, the general rule.'

This clearly shows that the company is to share as

well as the public in the general growth and prosperity of the country. It would seem, therefore, that the value of these properties can best be determined by reference to the cost of reproduction at the present time. As stated in the Wilcox case, cited in the decision rendered by the lower court upon a review of prior decisions of the supreme court of the United States,

> 'It is impossible to observe this continued use of the present tense in these decisions of the highest court without feeling that the actual or reproductive values at the time of inquiry is the first and most important figure to be ascertained.'

The roads under consideration were constructed and completed many years ago and what may have gone into them, if it could be determined with reasonable certainty, would not take into consideration the changed condition of the country since their original construction, its growth and prosperity—in which the companies are entitled to share—and by reason of changed conditions and lapse of time it has little weight in arriving at present values. As stated by Judge Hook in the recent case of *Missouri, Kansas & Texas Railway Company v. Love, et al.*, in this circuit,

> 'There is another matter to be regarded, not specifically mentioned in the above excerpt from the opinion of Mr. Justice Harlan. An established railroad system may be worth more than its original cost and more than the mere cost of its physical reproduction. It has passed the initial period of little or no return to its owners

> which, of greater or less duration, almost always follows construction and is not infrequently marked by default and bankruptcy. The inevitable errors in its building which finite minds and hands cannot avoid have been measurably corrected, time and effort have produced a commercial adjustment between it and the country it was intended to serve, relations have been established with patrons, and sources of traffic have been opened up and made tributary. In other words, the railroad, unlike one newly constructed, is fully equipped and is doing business as a going concern. It has attained a position after many experiences common to railroad enterprises which entail loss and cost not paid from current earnings and which correspondingly make for value.'

It is here proper to say that the foregoing decision was written in a very carefully considered case, in which many of the issues were practically the same as in the instant cases, and wherever applicable it must control the Master in determining the questions here raised. And this is so not only because it is a decision of one of the judges of this court but because it is in harmony with other like decisions of this court and of the supreme court of the United States and contains, as the Master believes, a comprehensive and accurate statement of the law and discloses a lucid conception and clear expression of the facts which are very generally found to exist in all these railroad rate cases. Practically everything contained in that decision is applicable to or has a more or less direct bearing upon the cases here under consideration and completely covers and denies many of the contentions of counsel for the State—urged at great length and with marked ability before the Master.

In the light of this decision and others therein referred to and approved, our first duty is to ascertain the fair value of the property devoted to the public service.

To this end a large volume of testimony was produced before the Master on behalf of complainants and the State, respectively, as to the reproduction cost of such property—and by such property is included only that which is used for the benefit of the public and which, with the revenue directly or indirectly derived from such use, is alone to be considered in determining the question of a reasonable rate. Other revenues and other properties the company may have but as to them the public has no concern."

Report of Physical Properties On Basis of Cost of Reproduction Called For by State of Minnesota.

"Prior to suit brought the State by its Railroad & Warehouse Commission called upon the defendant railroad companies and all other like companies in the state for a statement of all the properties of the companies, respectively, devoted to public use, with the valuation and the cost of reproduction new within the state, such statement to be made and returned upon itemized blank forms or schedules furnished for the purpose consisting of thirty-nine different items, into which divisions were to be made, and which when filled out would constitute an estimate of cost of reproduction of all the physical properties of each of said companies as made by it.

This led to a personal examination of the physical properties of the railroad companies which was made

by the State's engineer, employed for the purpose, and also by the agents and officers of the respective companies, and such schedules as so filled out and returned, with sundry modifications thereof by them made, have been produced before the Master, and testimony in support thereof was given by witnesses making such examinations."

Note.

BASIS DEFINED BY STATE—STATE ENGINEER MORGAN'S REPORT.

Complainant's Exhibit, Morgan, N. P., (10 N. P.)

Northern Pacific Report.

W. L. Darling— 2 N. P. 5-121.
Complainant's Exhibit 3, Darling, 2 N. P. 82, consisting of schedule of physical property.

Thomas Cooper— 2 N. P. 126:211-215.

Great Northern Report.

A. H. Hogeland— 2 G. N. 5.

Charles Hayden— 2 G. N. 166.

Dwight C. Morgan—
Basis adopted and forms described, 5 N. P. 1765-1778:1786-1790:1892-1895:2120-2124:2177-2182: 9 N. P. 4191-4193:4198-4204:
Physical Inspection of Railroads by Morgan—Time consumed, 5 N. P. 2173-2175.
Unit prices as of year 1905, 5 N. P. 1780-1786.
Defendant's Exhibit "OO," Morgan, Estimate "B," 5 N. P. 1833, (9 N. P.).
Defendant's Exhibit "QQ," Morgan, Estimate "A," 5 N. P. 1838, (9 N. P.)
Reasons for Estimate "B" and "A," 5 N. P. 2137-2140.

Present Value as defined by Morgan, 5 N. P. 1968:1980:2294-2297.
Strategy of location or efficiency not considered, 5 N. P. 2014-2016:2019:2026-2033:2117: 2135-2137.
Defendant's Exhibit "XX," Morgan, 5 N. P. 2268, (9 N. P.), consisting of a comparison of all cost of reproduction figures as reported by railroad and ascertained by State.

Dwight C. Morgan— 3 G. N. 1354-1372.
Defendant's Exhibit "C" Morgan, 3. G. N. 1355, (5 G. N.), being a statement of cost of reproduction of Great Northern properties in Minnesota.
Cross-Examination, 3 G. N. 1423-1432.

Evidence of Value of Terminal Lands Offered by Complainants.

Three competent and reliable real estate agents in each of the cities of St. Paul, Minneapolis and Duluth were selected by the railroad companies to make an appraisal of the terminal properties, exclusive of improvements, of each of the roads in their respective cities, and the valuations placed upon the properties by said several sets of appraisers in their respective cities, supported by their testimony produced before the Master, have been used by complainants as a basis for terminal values in said respective cities. These examinations and appraisements of railroad physical properties were made in the years 1906 and 1907 and the valuations so found were brought up to June 30, 1908, by adding thereto the valuations of properties acquired after such examinations and appraisements were made at the actual cost thereof.

The evidence discloses a wide difference of opinion with reference to the value of these properties, and in fairness to both parties to the controversy the Master has made findings as to each item in the schedule referred to and produced before him, and, where as to any item there is a very substantial difference between the parties, or between them and the value so found by the Master, he has briefly stated his reasons for the findings made.

The Master's findings of value are as follows:

VII.

Real Estate Valuations as of June 30, 1908.

Item 1—Lands for right-of-way, yards and terminals:

Northern Pacific case, amount allowed	$21,024,562.90
This amount is made up as follows:	
Terminal properties, St. Paul appraisement of Read, Watson & Taylor, as modified by railroad company	7,645.100.24
Add 5 per cent for cost of acquisition and consequential damages	382,255.01
Property acquired after appraisement	328.725.69
Minneapolis, appraisement of Elwood, Barney and Ridgeway, as modified by railway company	4,027,616.17
Add 5 per cent for acquisition and consequential damages	201,380.80
Property acquired after appraisement	227.737.26
Duluth, appraisement of Stryker, Mendenhall and Little	3,602,443.43
Add 25 per cent for railway value, cost of acquisition and consequential damages	900,610.85

Total value of terminals.....	17,315,869.45
Lands outside of terminals.....	3,708,693.45
Grand total	21,024,562.90"

Note.

EMPLOYMENT OF REAL ESTATE APPRAISERS—BASIS ADOPTED AND METHODS PURSUED.

Thomas Cooper— 2 N. P. 122:128:147-157: 184-210:420.

Conditions creating higher values in railroad terminal lands, 2 N. P. 173-175:184-190.

Testimony and Exhibits of Terminal Appraisers.

John D. Stryker, Duluth Appraiser— 2 N. P. 454.

Complainant's Exhibit 21, Stryker, (10 N. P.), being Northern Pacific-Duluth appraisal.

Lester B. Elwood, Minneapolis Appraiser— 2 N. P. 480.

Recalled, 3 N. P. 1024.

Complainant's Exhibit 22, Elwood, (10 N. P.).

Complainant's Exhibit 29, Cooper, (10 N. P.), being Northern Pacific-Minneapolis appraisal.

Fred E. Barney, Minneapolis Appraiser— 3 N. P. 1092.

John J. Watson, St. Paul Appraiser— 2 N. P. 507.

Complainant's Exhibit 23, Watson, (10 N. P.),

Complainant's Exhibit 30, Cooper, (10 N. P.), being Northern Pacific-St. Paul appraisal.

William C. Read, St. Paul Appraiser— 4 N. P. 1116.

Oscar L. Taylor, St. Paul Appraiser— 4 N. P. 1420.

Thomas Cooper:
Cross-Examination, 2 N. P. 147-238:420-444: 453.
Defendant's Exhibit "C," Cooper, 2 N. P. 172, (9 N. P.), consisting of statement of certain terminal purchases in St. Paul.

Thomas Cooper, Recalled by Complainants.
Certain reductions in terminal appraisement made by witness, 3 N. P. 1059.
Complainant's Exhibit 29, Cooper, 3 N. P. 1061, (10 N. P.), being comparison of Minneapolis appraisal with valuation reported to State Railroad Commission.
Complainant's Exhibit 30, Cooper, 3 N. P. 1064, (10 N. P.), being comparison of St. Paul appraisal with valuation reported to State Railroad Commission.
Complainant's Exhibit 70, Cooper, 7 N. P. 3041, (10 N. P.), being comparison of land values as reported by railroad and ascertained by State Engineer Morgan.
Complainant's Exhibit 71, Cooper, 7 N. P. 3043, (10 N. P.), consisting of list of all property purchased by Northern Pacific in St. Paul, 1905 to 1908, showing relation of purchase price to assessed valuation and percentage thereof.
Complainant's Exhibit 72, Cooper, 7 N. P. 3047, (10 N. P.), consisting of list of all property purchased by Northern Pacific in St. Paul, 1905 to 1908, showing relation of purchase price to assessed valuation and percentage thereof.
Complainant's Exhibit 73, Cooper, 7 N. P. 3049, (10 N. P.), consisting of statement showing application of Morgan plan for determining value of above purchases in St. Paul and Minneapolis as compared with actual cost thereof.
Complainant's Exhibit 74, Cooper, 7 N. P. 3052, (10 N. P.), consisting of schedule of all deeds

filed for record, January 1st, 1909, to February 28, 1909, in St. Paul, showing consideration in deeds and assessed value of property and percentage relation.

Complainant's Exhibit 78, Cooper, 7 N. P. 3077, (10 N. P.), showing amounts paid property owners for release of damages from operation of tracks on certain streets in Minneapolis.

TERMINAL LAND VALUES AND CONDITIONS AFFECTING SAME ARISING FROM INCREASED USE.

James J. Hill—	3 G. N. 1232-1242:1265: 1290-1293:1347.
Howard Elliott—	4 N. P. 1230-1232:1257-1277.

"Great Northern case; amount allowed	$25,172,630.80
St. Paul, appraisement of Read, Watson and Taylor	6,433,348.00
Add 5 per cent for cost of acquisition and consequential damages	321,667.40
Minneapolis, appraisement of Elwood, Barney and Ridgeway	11,619,765.00
Add 5 per cent for cost of acquisition and consequential damages	580,968.15
Duluth appraisement of Stryker, Mendenhall and Little	713,280.00
Add 25 per cent for railroad value, cost of acquisition and consequential damages	178,320.00
Total value of terminals	19,847,366.55
Lands outside of terminals	5,325,284.25
Grand total	25,172,650.80"

Note.

Charles Hayden, Assistant Land Commissioner, Great Northern Railway Co.—
Qualification and Experience, 2 G. N. 162-168.
Terminal Values—how ascertained, 2 G. N. 168-170:172.
Complainant's Exhibit 9, Hayden, 2 G. N. 173, (6 G. N.), being statement of right of way and terminal land values of Great Northern system.
Complainant's Exhibit 10, Hayden, 2 G. N. 180, (6 G. N.), being statement in detail by sections of land in Minnesota and values thereof.

Terminal Appraisers:
Oscar L. Taylor, St. Paul Appraiser—
2 G. N. 359.
Complainant's Exhibit 11, Taylor-St. Paul Appraisement, 6 G. N. 365 (6 G. N.).
William C. Read, St. Paul Appraiser—
2 G. N. 602.
John J. Watson, St. Paul Appraiser—
2 G. N. 617.
Lester B. Elwood, Minneapolis Appraiser—
2 G. N. 554.
Complainant's Exhibit 15 Elwood—2 G. N. 561, (6 G. N.).
John D. Stryker, Duluth Appraiser—
2 G. N. 592.
Complainant's Exhibit 17, Stryker, 2 G. N. 595, (6 G. N.).
James J. Hill:
Great Northern terminals—location, utility, value, etc., 3 G. N. 1232-1242:1290.

"Minneapolis & St. Louis case; amount allowed..... $ 5,999,397.90
Minneapolis, appraisement of Elwood, Barney and Ridgeway..... 4,556,298.00

Add 5 per cent for cost of acquisition and consequential damages..	227,814.90
Land outside of terminals.....	1,215,285.00
Grand total	5,999,397.90"

Note.

Alvin S. Cutler, Civil Engineer—
Qualifications and Experience, 3 M. & St. L., 909-911.
Complainant's Exhibit 27, Cutler, 3 M. & St. L. 911, (6 M. & St. L.), being statement of cost of reproduction of property of Minneapolis & St. Louis Railroad Company in Minnesota.
Basis of Value of Minneapolis Terminals, 3 M. & St. L. 914-918.
Complainant's Exhibit 29, Cutler, 3 M. & St. L. 918, (6 M. & St. L.), being statement of Minneapolis terminals and other terminals in State by divisions.
Lester B. Elwood, Minneapolis Appraiser—
3 M. & St. L. 982.

"In arriving at the foregoing valuation of terminals, upon a careful examination of the testimony the Master has taken the valuation of the terminal properties made by the three appraisers appointed by the railroad companies in each of the three cities named and who gave their testimony in these cases as found in the record and made such valuation a basis for his conclusions. He is of opinion that the reductions made from such valuations by the Northern Pacific Company as to its properties in St. Paul and Minneapolis were clearly justified by conditions differentiating the properties upon which such reductions

were made from other properties valued by the appraisers and which were not fully appreciated by them. They were much farther removed from the business centers of the cities and partook more of the nature of suburban property.

While it is true that the highest value of these terminal properties is their adaptability for railroad purposes and they must be acquired in a continuous tract suitable and convenient to meet the demands of the business and traveling public, thus largely enhancing their value, yet it is not true that these values for such purpose are limited only by the needs of the company and upon the theory that it must have the property or abandon the enterprise. It is not the needs of the company but the peculiar fitness and adaptability of the property for railroad purposes which gives it an enhanced value—often very much greater than for any other purpose. The fact that there is other property equally available in the immediate vicinity that a line of road of substantially the same efficiency and answering a like purpose can be secured by changing its course or the location of terminals may be properly taken into consideration as bearing upon railroad value. While it is true that in these cases these particular terminals and rights of way are the subject of valuation, and no other, still such valuation must not be based upon the assumption that the companies must have them at any price and must pay anything the owner sees fit to exact, but should be determined and controlled, as far as may be, by a survey of the whole situation, and comparisons, where they can be made, with other properties which are in like manner available.

The right of eminent domain is given to the company for the purpose of preventing the property owner from taking advantage of the necessities of the company as to any particular tract. While it is intended to secure to him its full and fair value for any purpose for which it is best adapted—and to this end an appeal is given to the courts from unrighteous awards—we are not to lose sight of the fact that railroads must be constructed along continuous lines and that the topography of the lands through which the lines are projected has much to do with their availability for railroad purposes and that such availability necessarily and properly enhances their value, for which the owner is entitled to compensation, and so it comes about that properties so available and favorably situated for the purpose have a much greater value than other adjoining or adjacent properties not so conditioned.

The Master is of the opinion that the appraisers of the St. Paul and Minneapolis terminals were fully impressed with their value for railroad purposes and their appraisement, as verified by them before the Master and as modified in the Northern Pacific case, is a generous valuation and should be accepted as full railroad value of the terminal properties and has been by him so accepted with an addition of five per cent to cover cost of acquisition and consequential damages, and which seems ample for the purpose in the large cities. The peculiar location of the properties did not seem to require a large increase on this account.

In Duluth, the appraisers were much more moderate in fixing values and seemed to have adjusted the same with reference to the adaptability of the property for

general business enterprises and not to have taken into consideration their special and increased value for railroad purposes. It is determined that their appraisement, increased by twenty-five per cent thereof, all things considered, will fairly cover reproduction cost, and their valuation is fixed at such sum accordingly."

Evidence Offered by Defendants Below of Values of Terminal Lands.

"The Master has not overlooked the testimony offered by the State bearing upon these valuations and has given to it such consideration as in his opinion it was entitled to. It is proper to say, however, that it has not impressed him as entitled to much weight. The avowed purpose of the State was to get away from opinion values as much as possible owing to the fact that witnesses are necessarily and unconsciously influenced by the interests of those at whose instance they are called, however fair and unbiased they may intend to be—considerations which the Master in fixing values has kept in mind. To this end the State has not offered the opinion of any witness as to the value of any of these terminal properties,—ignoring, as it would seem, the fact that real estate values are necessarily and largely a matter of opinion when applied to any particular tract or parcel of land. As a substitute therefor the State's engineer and chief witness on this subject has adopted a method, in each of the three terminal cities, substantially as follows, taking the city of St. Paul as an example:

He ascertained from the records the selling price of genuine sales of land for a period of years, and amounting to a large number, in every part of the city. The selling price of the lands without improvements, so far as this could be ascertained, was compared with the assessed value thereof, and it was found that on the average the assessed value was about sixty per cent of the selling price of such lands, and from this comparison the market value of the lands for general purposes was ascertained. Then the lands at varying width on each side of the side of the center line of the railroad land to be valued was divided into sections so that the lands in each section, according to his judgment, should be as nearly as practicable of like value, and the assessed value of the lands in such section was obtained and such assessed value was determined to be sixty per cent of the market value of the lands assessed. The market value, or, as he styles it, the "true value" so found was then applied to the railroad lands within the section, and to find their railway value, seventy-five per cent thereof was added to such market value, it having been determined by him that railroad companies have to pay on the average seventy-five per cent more for properties required by them than the market value as so found.

Such, in brief, is the State's method of producing terminal property values, and generally known as the assessment and sales method.

It is conceded that when applied to any particular tract of land it cannot be relied upon, but it is claimed that when applied to extensive contiguous tracts, as are rights of way, the doctrine of averages will bring about reasonably correct results. To make a market value

assessment, the assessor could not rely on such methods with respect to any particular tract, but would be compelled to make a personal inspection and determine whether assessment must be reduced or increased and where it stood with reference to such average. We can understand that, for the purpose of equalizing values as between counties where many contiguous sections of land are under consideration and for the purpose of making each county pay its relative proportion of state taxes, such method would be of great value by reason of the broad base for purposes of comparison, but the relative market value for the counties having been ascertained, then a personal inspection by the assessor would be necessary of each tract assessed to determine whether the assessment must be reduced or increased, that is, whether as previously assessed it was above or below the general average.

The evidence shows that the railroad lands in St. Paul constitute about eight per cent of all the assessed lands in the city, and, distributed among all the railroads owning terminal properties, each has but a very small per cent thereof. These considerations, added to the notoriously gross inequalities of assessments, compel the Master to give little weight to testimony of this character. On the other hand, he does not conceive he is bound to accept opinion testimony as absolute but only as a large determining element in connection with all the facts and circumstances disclosed in the evidence, and this has been done in reaching his conclusions. He has given careful consideration to actual purchases recently made in acquiring property for railroad purposes and cited to show that

they substantiate values fixed by the witnesses on either side, for of course they are of great value for such purpose.

No deduction has been made for street crossings or parts of streets used for right of way held under rights acquired from the respective city authorities without acquisition of the fee. For railroad purposes these rights are substantially as valuable as if held under absolute title. They are permanent in character and in case of reproduction would cost practically as much as private property."

Note.

BASIS DEFINED BY ENGINEER MORGAN.

Morgan Report, Complainant's Exhibit, Morgan, N. P., (10 N. P.).

Dwight C. Morgan—

Experience and Qualifications, 5 N. P. 1762: 2172.

Employment by Minnesota Commission, 5 N. P. 1764.

Basis Adopted—Conference with Railroads and forms for Reports described, 5 N. P. 1765-1778:1786-1790.

Terminal Valuations:

Sectional maps, 5 N. P. 1792.

Recorded sales and assessment records examined, 5 N. P. 1798-1804:1814-1820:1920-1922.

Higher cost of land for railroad purposes, 5 N. P. 1804.

Defendant's Exhibit "OO" Morgan, Estimate "B," 5 N. P. 1833 (9 N. P.)

Defendant's Exhibit "PP" Morgan, mileage of Northern Pacific in Minnesota, 5 N. P. 1838 (9 N. P.).

Defendant's Exhibit "QQ" Morgan, Estimate "A," 5 N. P. 1838 (9 N. P.).
Difference between Estimates "B" and "A," 5 N. P. 1838:2277-2281.
Difference between Morgan and Railroad basis, 5 N. P. 1866.
Cross-Examination:
Basis and scope of plan of valuation, 5 N. P. 1970:1976-1980.
No Facts Showing Value in Commission's Records, 1973.
Basis in Michigan, Wisconsin, etc., 5 N. P. 1974-1976.
Terminal Values—basis, etc.; Sectional map method examined, 5 N. P. 1981-2014:2016: 2025:2033-2036:2145-2167:2281.
Sectional Plan applied to Union Depot lands in St. Paul, Morgan, 5 N. P. 2298-2336: 6 N. P. 2522-2607.
Assumptions upon which Morgan plan rests, Morgan, 5 N. P. 2336-2354:2356-2382.
Report of Engineer Morgan to Railroad Commission, Complainant's Exhibit 10 N. P. offered in evidence, 5 N. P. 2171.
Complainant's Exhibit 65, Morgan, 5 N. P. 5172, (10 N. P.), being report of Special Committee of St. Paul Common Council, relating to assessments in St. Paul, offered in evidence.
Complainant's Exhibit 66, Morgan, 5 N. P. 5172, (10 N. P.), being letter from Secretary of Minnesota Tax Commission, showing ratio of sales in St. Paul to assessments, offered in evidence.
Defendant's Exhibit 3-R, Morgan, 8 N. P. 4178, (9 N. P.), analyzing Complainant's Exhibit Cooper 71.
Defendant's Exhibit 3-S, Morgan, 8 N. P. 4181, (9 N. P.), analyzing Complainant's Exhibit Cooper 72.
Defendant's Exhibit 3-T, Morgan, 8 N. P.

4182, (9 N. P.), showing total area of St. Paul and Minneapolis with acres exempt from taxation separate, and assessed value and true value of taxable property.

Land Values Outside of Terminals.

"With reference to right of way values outside of terminals, opinion testimony has been submitted by both parties, and, save in the Minneapolis & St. Louis case, there are wide differences between them. They have both used multipliers, generally of three, to cover cost of reproduction over market value. That is, the market value of adjacent lands has been ascertained and applied to the right of way lands and such value multiplied by three to ascertain what it would cost a railroad company to acquire the property. Whether this multiple has been used in the same manner, having in mind the same basis is somewhat doubtful. In determining such basis the Master believes the witnesses for the complainants have been somewhat expansive, influenced measurably by the increased value for railroad purposes over its ordinary market value for farm purposes, and have used too large a multiplier. At the same time, the testimony of the chief witness for the State is much impaired by the fact that he evidently based his estimates upon valuations as fixed by the complainants' witnesses, of which they are found to be, in some fifty-two villages on the Northern Pacific road, an exact per cent and ranging from twenty to eighty per cent lower than such valuations. (See Exhibit 75—Cooper.) It is not doubted that he made as careful and painstaking effort, within the limited time he was able to devote to the purpose, as was prac-

ticable to ascertain and determine the market value of the properties appraised, but the weight of such testimony would have been manifestly greater if valuations had been independently fixed by him without regard to those previously made by the railroad company. At the same time the fact that his values of such property in the Mineapolis & St. Louis case, as also of much other property on that line of railway, were so nearly the same as the value of the chief witness for complainants in that case that they were able to compromise their differences has a tendency to corroborate his values on the other roads.

Upon careful consideration of the evidence and all the circumstances thereby disclosed bearing on the question, seventy-five per cent of the valuations as fixed by complainants' witnesses has been determined upon as the fair reproduction value of the property in the Northern Pacific and Great Northern cases"

Note.

Thomas Cooper:

Qualification and Experience, 2 N. P. 122-126.

Complainant's Exhibit 8, Cooper, 2 N. P. 125, (10 N. P.), showing amount of right of way purchased by witness.

Complainant's Exhibit 9, Cooper, 2 N. P. 126, (10 N. P.), valuation of Northern Pacific right of way lands.

Methods Adopted to Ascertain Land Values, 2 N. P. 126-138.

Severance Damages, 2 N. P. 136:244-246.

Multiple Outside of Terminals, 2 N. P. 210-229: 246-255.

Complainant's Exhibit 10, Cooper, 2 N. P. 133,

(10 N. P.), showing actual cost of right of way purchased 1905 to 1908, for line changes and new lines.
Complainant's Exhibit 12, Cooper, 2 N. P. 238, (10 N. P.). Comparison of Land Values, State and Railroad figures.
Conditions Affecting Title to Northern Pacific Land Grant Lands, 2 N. P. 444-452.
Cross-examination, 2 N. P. 147-238:420-444: 453.
Defendant's Exhibit "L," Cooper, 2 N. P. 421, (9 N. P.), being segregation of land values between Northern Pacific R. R. Co. and St. Paul & Duluth R. R. Co. (now owned by Northern Pacific).
Defendant's Exhibit "M," Cooper, 2 N. P. 426, (9 N. P.), being segregation of Northern Pacific lands between acres in actual railroad use and acres not so actually used.
Defendant's Exhibit "M-1," Cooper, 2 N. P. 436, (9 N. P.), being segregation of Northern Pacific system lands between area purchased and area granted, with valuation of each.
Re-Cross-Examination, 3 N. P. 1071-1092.

Thomas Cooper, Recalled by Complainants.
Certain Clerical Errors in Exhibits Corrected, 7 N. P. 3040.
Discussion of Morgan Methods, 7 N. P. 3042.
Complainant's Exhibit 75, Cooper, 7 N. P. 3055, (10 N. P.), being comparison of appraisement by railroad and state engineer of right of way and station grounds within corporate limits of all cities and towns in Minnesota excepting St. Paul, Minneapolis and Duluth, and showing even percentage reductions of railroad values by State Engineer.
Complainant's Exhibit 76, Cooper, 7 N. P. 3062 (10 N. P.), consisting of comparison between railroad values, state engineer values and local appraisers' values in eleven largest

towns in Minnesota, on Northern Pacific, outside of St. Paul, Minneapolis and Duluth.

Complainant's Exhibit 77, Cooper, 7 N. P. 3068, (10 N. P.), being statement of expenditures for right of way for new line between Frazee and Detroit and between Lake Park and Glyndon, Minnesota, February, 1906, to October 31, 1908, and showing actual cost of each tract purchased and acreage thereof with summary showing average cost per acre in towns and in country.

Re-Cross-Examination, 7 N. P. 3078-3119.

Charles Hayden— 2 G. N. 170.

Complainant's Exhibit 9, Hayden, 2 G. N. 173, (6 G. N.). Statement consisting of valuation of Great Northern system lands, and in Minnesota showing miles, acres and average rates per acre by states and sections.

Complainant's Exhibit 10, Hayden, 2 G. N. 176, (6 G. N.), being detailed summary of Great Northern land values in Minnesota by sections.

Cross-Examination, 2 G. N. 183-292.

Multiple of 3 in stating rural values, 2 G. N. 208-217.

Re-Direct-Examination,

Basis of Values outside of Terminals, 2 G. N. 303-323.

Sale of right of way of 63 miles by Great Northern to Northern Pacific in 1883, showing average price per acre compared with average price per acre claimed at present time, 2 G. N. 326.

Valuation secured in numerous smaller cities in State, 2 G. N. 332-340.

Re-Cross-Examination, 2 G. N. 341-358.

"Item 2—Grading, Clearing and Grubbing.

Northern Pacific Case.

Amount allowed.....$12,331,541.52

After allowance by State for adaptation and solidification placed by it in an item by itself, and by complainants included in this Item 2, the difference between the parties is substantially $850,339.68, and is fully accounted for by inadequate unit prices and insufficient quantities adopted by the State's witness as the basis of his estimate.

Item 2—Great Northern Case.

Amount allowed.....$21,685,802.00

Complainant claims for this item $22,155,453, which includes $3,235,022.91 allowed by the State as a separate item for adaptation and solidification of roadbed and $448,227 for additions to the road after June 30, 1907—to which time only the State's estimates were made. This left a difference between the parties of $1,798,792.85. I have credited the complainant with this difference except items for abandoned right of way, amounting to $135,876, and the further sum of $333,775 for estimate of work not of record. There seems to be no substantial reason for not allowing for the extra work shown by the records and also the usual ten per cent increase on work shown only by profile—a usual allowance for profile estimates and so recognized and accepted by the State's engineer in the Northern Pacific Case. As to unit prices, the weight of evidence in this and the other cases shows that the State's witness in the unit prices used by him failed to allow an adequate amount for extra cost of other

than contract work and in this respect unit prices fixed by complainants' witnesses should be accepted.

Item 2—Minneapolis & St. Louis Case.

Amount allowed .....$2,551,690.00"

Note.

Northern Pacific Case.

William L. Darling, Chief Engineer Northern Pacific Co.— 2 N. P. 10:21:32-34:38:47-57:564-587.

Complainant's Exhibit 2 Darling, 2 N. P. 7, (10 N. P.), being system cost of reproduction with details of cost of grading, etc.

Complainant's Exhibit 3 Darling, 2 N. P. 55, (10 N. P.), being cost of reproduction in Minnesota with details.

Defendant's Exhibit "B" Darling, 2 N. P. 114, (9 N. P.), being letter from Morgan to Elliott regarding quantities.

Complainant's Exhibit 4 Darling, 2 N. P. 118, (10 N. P.), being actual cost of grading on certain lines.

Analysis of differences between Railroad and State, 7 N. P. 3208-3218.

Complainant's Exhibit 8 Darling, 7 N. P. 3212, (10 N. P.), being statement of actual cost of grading certain lines divided into classes of materials, prices, etc.

Complainant's Exhibit 82, Darling, 7 N. P. 3214, (10 N. P.), being statement of unit prices and amounts paid contractors, 1879 to 1907, for grading done.

Complainant's Exhibit 85 Darling, 7 N. P. 3229, (10 N. P.), being revised statement of cost of reproduction in Minnesota.

Cross-Examination, 7 N. P. 3229.

John B. Berry— 3 N. P. 718.
Chief Engineer, Chicago, Rock Island & Pacific Railway Company.
Inspection and physical appraisal of Northern Pacific System, 3 N. P. 720.
Grading, 3 N. P. 737:753.
Cross-Examination, 3 N. P. 756.

Great Northern Case.

A. H. Hogeland, Chief Engineer, Great Northern Railway Company—
Experience and Qualification, 2 G. N. 2-5.

John F. Stevens— 2 G. N. 416-430.
Complainant's Exhibit 2, Hogeland, 2 G. N. 11, (6 G. N.), being statement in detail of Cost of Reproduction of Great Northern lines in Minnesota.
Item 2, Exhibit 2, Hogeland.
Classified quantities and prices of grading.
Grading—testimony, 2 G. N. 11-21.
Complainant's Exhibit 3, Hogeland, 2 G. N. 15, (6 G. N.), being statement showing sources from which grading quantities were obtained.
Complainant's Exhibit 4, Hogeland, 2 G. N. 19, (6 G. N.), being statement from Company records of contract quantities and cost of grading on lines enumerated.
Complainant's Exhibit 8, Hogeland, 2 G. N. 60, (6 G. N.), being statement of cost of reproduction of Great Northern system in detail.
Cross-Examination. 2 G. N. 66:91:142-153.
3 G. N. 1029-1053:1056-1072.
Complainant's Exhibit 51, Hogeland, 3 G. N. 994, (6 G. N.), being statement showing quantities moved and prices paid contractors for grading, from vouchers on file.
Complainant's Exhibit 4, Hogeland, Corrected,

3 G. N. 1000, (6 G. N.), correcting certain errors in Exhibit 4, Hogeland.
Recalled, 4 G. N. 1557.
Grading, 4 G. N. 1558-1604:1625-1627:1698.
Re-Cross-Examination, 4 G. N. 1634-1681.

Minneapolis & St. Louis Case.

Alvin S. Cutler, Engineer—
3 M. & St. L. 920.
Complainant's Exhibit 30 Cutler, (6 M. & St. L.), being detailed summary of cost of reproduction of M. & St. L. lines in Minnesota.

Dwight C. Morgan, State Engineer—
Grading quantities, 5 N. P. 1827:1922-1927; 2069-2074:8 N. P. 4186.
Adaptation and Solidification—nature of this item —5 N. P. 1838:1859-1864:2065-2115:2279-2281.
Defendant's Exhibits "OO" and "QQ" Morgan, (6 N. P.).
Defendant's Exhibit "XX" Morgan, (6 N. P.).
Defendant's Exhibit "C" Morgan, (6 G. N.).
Defendant's Exhibit "F" Morgan, (6 G. N.).
Re-Direct Examination, 3 G. N. 1382.
Defendant's Exhibit "I" Morgan, 4 M. & St. L. 1056.
Defendant's Exhibit "J" Morgan, 4 M. & St. L. 1056.
Testimony, 4 M. & St. L., 1059-1060.

James J. Hill—
Evidence relating to greater value in seasoned roadbed, 3 G. N. 1299:1303.

Howard Elliott—
Evidence relating to same subject, 4 N. P. 1250.

"Item 3—Protection Work, Rip-rap and Retaining Walls.

Northern Pacific Case.

Amount allowed.....$374,091.53

The State's testimony would very materially increase this amount.

Item 3—Great Northern Case.

Amount allowed.....$850,069.00

It is conceded that as to this item the only difference between the parties is as to the unit prices. In the Northern Pacific case the price of $2 per yard for rip-rap claimed by complainant's witness seems to have been conceded by the State, and no reason appears for the State not conceding it here and insisting, as it does, that only $1.25 per yard should be allowed.

Item 3—Minneapolis & St. Louis Case.

Amount allowed.....$52,240.00."

Note.

Complainant's Evidence.

William L. Darling— 2 N. P. 571.
Complainant's Exhibit 2 Darling, (10 N. P.).
Complainant's Exhibit 3 Darling, (10 N. P.).
Complainant's Exhibit 85 Darling, (10 N. P.).

A. H. Hogeland— 2 G. N. 21: 4 G. N. 1608.
Complainant's Exhibit 2 Hogeland, (6 G. N.).

John F. Stevens— 2 G. N. 431.

Alvin S. Cutler— 3 M. & St. L. 922.
Complainant's Exhibit 30 Cutler, (6 M. & St. L.)

Defendant's Evidence.

Dwight C. Morgan— 4 N. P. 1927.
Defendant's Exhibits:
"OO" and "QQ" Morgan, (9 N. P.).
"XX" Morgan, (9 N. P.).
"C" Morgan, (5 G. N.).
"I" and "J" Morgan, (5 G. N.).

"Item 4—Tunnels.

Northern Pacific Case.

Amount allowed.....$253,250.00

The chief difference between the parties concerning this item is as to the allowance of anything for the Seventh street viaduct, so-called, in the city of St. Paul, constructed by the city after the road was built. The Northern Pacific Company did not construct this tunnel, nor does it appear from the evidence that even under the latest decisions of the courts it could have been compelled so to do. It is, so far as appears, a permanent structure not likely to require repair or replacement; at least the evidence does not disclose to the contrary. It forms an adequate passageway for the movement of trains, as much so as if created by natural conditions, and is substantially different from overhead bridges and like structures which the company could be compelled to reconstruct and maintain and which will require frequent repairs, renewals and replacements. If such were required, it may be assumed, in the absence of testimony to the contrary, that the city would be obliged to do the work and that the company's rights were properly safeguarded when it consented to the construction of a causeway over its right of way.

Item 4—Great Northern and Minneapolis & St. Louis Cases.

There are no tunnels on these lines in Minnesota."

Note.

Northern Pacific Case.

William L. Darling— 2 N. P. 11 : 7 N. P. 3218.
Complainant's Exhibit 2 Darling, (10 N. P.).
Complainant's Exhibit 3 Darling, (10 N. P.).
Complainant's Exhibit 85 Darling, (10 N. P.).
Complainant's Exhibit 5 Darling, (10 N. P.).

Dwight C. Morgan— 5 N. P. 1927.

"Item 5—Cross-ties and Switch-ties.

Northern Pacific Case.

Amount allowed.....$3,657,576.70

Accepted as claimed by complainant and includes transportation.

Item 5—Great Northern Case.

Amount allowed.....$5,460,809.00

The complainants have taken as average price of ties 70.5 cents. The price for ties as claimed in the Northern Pacific case, with a larger per cent of high-grade ties, is 67.2 cents, which is deemed fair and is accepted for this case. The State's valuation of 55.5 cents per tie is based upon prices in 1905 and does not allow for inspection and handling. The rapidly increasing price of ties since that time clearly justifies the finding here made.

Item 5—Minneapolis & St. Louis Case.

Amount allowed.....$1,149,829.00

The ties on this road were high-grade, oak and cedar exclusively, and the price claimed for same, respectively, 75 cents for oak and 65 cents for cedar, is accepted, being the same as allowed in the Northern Pacific case for such quality of ties. The State found a shortage of 32,000 ties in the number claimed and a deduction is made therefor at 70 cents per tie, it not appearing of what kind the deficiency consisted."

Note.

Complainant's Evidence.

William L. Darling— 2 N. P. 553.
3 N. P. 944.
7 N. P. 3219.
Complainant's Exhibit 2, Darling, (10 N. P.).
Complainant's Exhibit 3, Darling, (10 N. P.).
Complainant's Exhibit 85, Darling, (10 N. P.).
Complainant's Exhibit 4, Sheet 3, (10 N. P.).
Complainant's Exhibit 26, Berry, (10 N. P.).

A. H. Hogeland— 2 G. N. 22.
3 G. N. 990:1019:1054.
4 G. N. 1604.

John F. Stevens— 2 N. G. 431.
Complainant's Exhibit 2, Hogeland, (6 G. N.).
Complainant's Exhibit 2 Hogeland, Item 5, (6 G. N.).
Complainant's Exhibit 50 Hogeland (3 G. N. 992) (6 G. N.).
Complainant's Exhibit 13, Hogeland, (2 G. N. 485) (6 G. N.).

Alvin S. Cutler— 3 M. & St. L. 946.
Complainant's Exhibit 30, Cutler, (6 M. & St. L.).

Defendant's Evidence.
Dwight C. Morgan— 5 N. P. 1927-1933.
5 N. P. 2287-2290.
3 G. N. 1374.
Defendant's Exhibits "OO" and "QQ," Morgan, (9 N. P.).
Defendant's Exhibit "C," Morgan, (5 G. N.).
Defendant's Exhibits "I" and "J," Morgan, (5 M. & St. L.).

"Item 6—Ballast.

Northern Pacific Case.

Amount allowed.....$1,960,969.00

This amount is found by taking the same unit price as in the Great Northern case of 62 cents per yard.

Item 6—Great Northern Case.

Amount allowed.....$3,861,360.00

The main difference between the parties is unit prices. A careful analysis of the testimony justifies the prices and quantities claimed by complainants of 62 cents per yard. The State clearly overlooked items of expense in a very considerable amount in the unit prices of 45 cents per yard adopted by it. Other reliable testimony fixes such prices much higher than those above allowed, while complainant's chief witness, from actual measurements on the ground and records of the company, was best qualified to testify as to quantities.

Item 6—Minneapolis & St. Louis Case.

Amount allowed.....$357,855.00."

Note.

Complainant's Evidence.

William L. Darling— 3 N. P. 1006:1013.
7 N. P. 3220.
Complainant's Exhibit 2, Darling, (10 N. P.).
Complainant's Exhibit 3, Darling, (10 N. P.).
Complainant's Exhibit 85, Darling, (10 N. P.).
Complainant's Exhibit 4, Sheet 4, Darling, (10 N. P.).
Complainant's Exhibit 83, Darling, (7 N. P. 3221) (10 N. P.).
Complainant's Exhibit 26, Berry, (10 N. P.).

A. H. Hogeland— 2 G. N. 24.
4 G. N. 1613.
Complainant's Exhibit 2, Hogeland, (6 G. N.).
Complainant's Exhibit 6, Hogeland, (6 G. N.).

John F. Stevens— 2 G. N. 436.

Alvin S. Cutler— 3 M. & St. L. 922.
Complainant's Exhibit 30, Cutler, (6 M. & St. L.).

Defendant's Evidence.

Dwight C. Morgan— 5 N. P. 1931-1942.
5 N. P. 2095-2110.
8 N. P. 4187-4205.
3 G. N. 1409.
Defendant's Exhibits "OO" and "QQ," Morgan, (9 N. P.).
Defendant's Exhibit "C," Morgan, (5 G. N.).
Defendant's Exhibits "I" and "J," Morgan, (5 M. & St. L.).

"Item 7—Rails.

Northern Pacific Case.

Amount allowed.....$5,645,307.73

This includes handling, inspection and transporta-

tion to central points of each section under construction.

Item 7—Great Northern Case.

Amount allowed.....$9,053,977.00

The only material difference between the parties after allowance for rails acquired after June 30, 1907, not included in the State's estimate, is in unit prices and here allowed at $30.25 per ton at St. Paul and Duluth. The State's engineer and the engineer in the Northern Pacific case fix this price at $29.75, the former as of June 30, 1907, the latter as of June 30, 1906. Having in mind the difference in time and prices paid by the company in 1908 and the matter of handling and inspection allowed indirectly if at all by the State, $30.25 seems to be a fair average price. Transportation charges to the front is claimed for and allowed in a separate item.

Item 7—Minneapolis & St. Louis Case.

Amount allowed.....$1,540,392.00."

Note.

Complainant's Evidence.

William L. Darling— 2 N. P. 35.
3 N. P. 1009.
7 N. P. 3222.
Complainant's Exhibit 2, Darling, (10 N. P.).
Complainant's Exhibit 3, Darling, (10 N. P.).
Complainant's Exhibit 85, Darling, (10 N. P.).
Complainant's Exhibit 26, Berry, (10 N. P.).

A. H. Hogeland— 2 G. N. 26.
Complainant's Exhibit 2, Hogeland, (6 G. N.).

John F. Stevens— 2 G. N. 442.

Alvin S. Cutler— 3 M. & St. L. 923.
Complainant's Exhibit 30, Cutler, (6 M. & St. L.).

Defendant's Evidence.
Dwight C. Morgan— 5 N. P. 1942-1945.
5 N. P. 1949-1951.
Defendant's Exhibits "OO" and "QQ," Morgan, (9 N. P.).
Defendant's Exhibit "C," Morgan, (5 G. N.).
Defendant's Exhibits "I" and "J," Morgan, (5 M. & St. L.).

"**Item 8—Track Fastenings.**

Northern Pacific Case.

Amount allowed.....$727,228.37

This is the amount claimed by complainant. If acquisition after State's estimate was made is excluded, the amount allowed is substantially less than the State was willing to concede.

Item 8—Great Northern Case.

Amount allowed.....$2,087,615.00

The difference in the estimates of the respective parties is $171,146.28 of which $28,800 is due to acquisition after State's estimate was made. The residue is due to difference in unit prices and those of complainant are accepted as they are based on actual prices paid during the current year and there is nothing in the testimony to suggest that they are improper.

Item 8—Minneapolis & St. Louis Case.

Amount allowed.....$258,561.00."

Note.

Complainant's Evidence.

William L. Darling— 2 N. P. 36.
3 N. P. 1010.
7 N. P. 3223.
Complainant's Exhibit 2 Darling, (10 N. P.).
Complainant's Exhibit 3 Darling, (10 N. P.).
Complainant's Exhibit 85 Darling, (10 N. P.).

A. H. Hogeland— 2 G. N. 27.
Complainant's Exhibit 2 Hogeland, (6 G. N.).

John F. Stevens— 2 G . N. 443.

Alvin S. Cutler— 3 M & St. L. 923.
Complainant's Exhibit 30 Cutler, (6 M. & St. L.).

Defendant's Evidence.

5 N. P. 1945.
Defendant's Exhibits "OO" and "QQ" Morgan, (9 N. P.).
Defendant's Exhibit "C" Morgan, (5 G. N.).
Defendant's Exhibits "I" and "J" Morgan, 5 M. & St. L.

"Item 9—Switches, Frogs and Railroad Crossings.

Northern Pacific Case.

Amount allowed.....$303,717.80

The difference between estimates of the respective parties is not large and for the most part arises from additions made after State's estimate was made. If Items 8 and 9 are taken together there is substantial agreement between the parties.

Item 9—Great Northern Case.

Amount allowed.....$300,519.00

The State concedes a substantially greater amount

if acquisitions after State's estimate was made are added to it.

Item 9—Minneapolis & St. Louis Case.

Amount allowed.....$66,807.00."

Note.

Complainant's Evidence.

William Darling— 2 N. P. 36—
7 N. P. 3223.
Complainant's Exhibit 2 Darling, (10 N. P.).
Complainant's Exhibit 3 Darling, (10 N. P.).
Complainant's Exhibit 85 Darling, (10 N. P.).

A. H. Hogeland— 2 G. N. 28.
Complainant's Exhibit 2 Hogeland, (6 G. N.).

Alvin S. Cutler— 3 M & St. L. 923.
Complainant's Exhibit 30 Cutler, (6 M. & St. L.).

Defendant's Evidence.

Defendant's Exhibits "OO" and "QQ" Morgan, (9 N. P.).
Defendant's Exhibit "C" Morgan, (6 G. N.).
Defendant's Exhibits "I" and "J" Morgan, 6 M. & St. L.

"Item 10—Track Laying and Surfacing.

Northern Pacific Case.

Amount allowed.....$1,600,591.56

In taking the amount claimed by complainant as the amount allowed the fact is not overlooked that 439.476 miles of road is allowed for at the rate of $1,050 per mile instead of $760 per mile as in the other cases. The latter figure covers only such surfacing as is necessary for ballast and construction

trains. In taking the higher figure it is not contemplated that the surfacing will be immediately followed by ballasting, but that it will leave the road in condition suitable for commercial business and that it will be followed by ballasting at some later time. A similar division of work is not found in the other cases, where it seems to be assumed that surfacing will be immediately followed by ballasting to make a completed road ready for operation.

Item 10—Great Northern Case.

Amount allowed.....$2,207,753.00

It is difficult to reconcile the wide difference between the parties in these cases with respect to this item. As a matter of fact it is of such character that there ought not to be great disparity in unit values. In this (the Great Northern case) the State's estimate is based on a cost of $500 per mile, while complainant bases on a cost of $835 per mile, with the items entering into such cost substantially the same. For so-called contract work (that is, labor of handling material and laying track,) the State allows only $275 per mile. It appears from the records of the company (Ex. 7—Hogeland) that as long ago as 1898 in the construction of 150 miles of road in Minnesota the company actually paid $359 per mile for such work —an undertaking sufficiently extensive to be a fair criterion of value. If such was the sum necessarily paid, as the books of the company show—and they are not challenged—it would have cost much more in 1908, $400 per mile being a low estimate. Again, the State allows, in the Northern Pacific case, and

presumptively the same in this, only $28.75 for surfacing while in the work referred to in 1898 the company actually paid $142 per mile for such work. This small amount allowed by the State for surfacing was upon the theory that where track laying was to be followed as soon as practicable by ballasting little surfacing would be required. The testimony shows that even in such case it is customary and more economical to do a very considerable amount of surfacing to hold the track and ties in place for ballasting and the construction work to follow. The amount so allowed by the State seems greatly inadequate. For train service the State allows only $61.30 per mile, whereas in the work of 1898 referred to the actual cost was $114 per mile. Taking the difference in time, increased cost and other matters into consideration, it would seem that the complainant's claim in the Northern Pacific case of $760 per mile is fairly conservative, and is adopted as a proper basis for this item in each of the three cases. Such allowance contemplates that there will be very considerable surfacing from the sides so as to make the road sufficiently permanent and stable for the passage of ballast and construction trains in the further prosecution of the work but not in condition for commercial traffic.

Item 10—Minneapolis & St. Louis Case.

Amount allowed.....$384,751.00

It appears that the company in 1906 and 1907 did work of this character in South Dakota and amounting to 250 miles at a cost of $890 per mile, of which $130 per mile was charged as material-yard expense.

Such expense does not appear in the estimates in the other cases, and if in this it is deducted from the total claimed, we have $760 per mile, just the amount allowed in those cases. Whatever may have been the conditions in South Dakota appertaining to this work there done, it does not satisfactorily appear that for the road in this state such expense would be necessary."

Note.

Complainant's Evidence.

William L. Darling— 2 N. P. 563.
3 N. P. 936-988.
3 N. P. 1012.
7 N. P. 3223
Complainant's Exhibit 2, Darling, (10 N. P.).
Complainant's Exhibit 3, Darling, (10 N. P.).
Complainant's Exhibit 85, Darling, (10 N. P.).
Complainant's Exhibit 84, Darling, (7 N. P. 3223) (10 N. P.).

John B. Berry— 3 N. P. 892.
Complainant's Exhibit 26 Berry, (10 N. P.).

A. H. Hogeland— 2 G. N. 28:56.
4 G. N. 1616:1717.
Complainant's Exhibit 2, Hogeland, (6 G. N.).
Complainant's Exhibit 7, Hogeland, (6 G. N.).

John F. Stevens— 2 G. N. 443.

Alvin S. Cutler— 3 M. & St. L. 923:937.
Complainant's Exhibit 30 Cutler, (6 M. & St. L.).

Defendant's Evidence.

Dwight C. Morgan— 5 N. P. 1946.
8 N. P. 4188.
3 G. N. 1411.
4 M. & St. L. 1063.
Defendant's Exhibits "OO" and "QQ" Morgan, (9 N. P.).

Defendant's Exhibit "C" Morgan, (5 G. N.).
Defendant's Exhibits "I" and "J" Morgan, (5 M. & St. L.).

"Item 11—Bridges, Trestles and Culverts.
Northern Pacific Case.

Amount allowed.....$3,586,053.00

Allowing for construction after State's estimate was made, there remains a difference between the parties of $896,072.21. The State bases its figures, apparently, in a large measure upon the reports made of such work by a number of other important railroad lines. Its engineer made use of these reports in making up the estimate in connection with his own very considerable knowledge and experience in such matters—and such estimate is not to be ignored. It is to be observed, however, that reports of other companies not supported by evidence as to basic facts should be received with caution. Exhibit 86—Darling—discloses the difference between the parties with respect to the items of work making up the total aggregate and actual prices paid for such items in recent years, from which it appears that the unit prices so paid are considerably higher than those used by the State. Upon careful review of the whole testimony it is determined to allow to complainant on account of this item a sum equal to two-thirds of this difference; that is, State's allowance, $2,578,014, plus new work, $410,658, plus two-thirds of $896,072 equals $3,686,053.

Item 11—Great Northern Case.

Amount allowed.....$6,664,729.00

Allowing for construction after State's estimate was made and omissions from it of bridges and, seemingly, also, of foundation work, the difference between the parties is $448,589.44, and is to be accounted for by difference in unit prices. The State's prices are compared with the prices returned by a number of other important railroad lines in the state and seem to have been quite largely based upon or fixed with reference to them, as appears in the Northern Pacific case. For reasons stated in that case there is allowed to complainants two-thirds of the difference on account of this item; that is, state's allowance $5,141,781 plus new work and omitted bridges and foundations $1,223,889 plus two-thirds of $448,589 equals $6,664,729.

Item 11—Minneapolis & St. Louis Case.

Amount allowed.....$1,025,827.00

The difference between the parties on this item is $354,292. Except as to three overhead bridges in Minneapolis, the chief witnesses seemed to harmonize as to quantities. It was claimed by the State that the three bridges mentioned were built by the city and for this reason no allowance was made therefor. But as they apparently form a part of street highways, as the law now is, their repair and renewal as required must be borne by the company and the city could not have been compelled to construct them in the first instance if the law had been properly interpreted and observed. Their reproduction cost should have been allowed at the sum of $54,580. This must be offset by an error in quantities of masonry found by the State's witness, amounting, at the unit prices reported by the com-

pany, to $23,000, which leaves $31,580 to be added to the State's estimate, leaving a difference of $322,712, due apparently to unit prices. For reasons stated in the other case the benefit of two-thirds thereof is given to complainants. State's estimate $799,106 plus $31,580 plus two-thirds $322,712 equals $1,025,827."

Note.

Complainant's Evidence.

William L. Darling— 2 N. P. 21:41.
7 N. P. 3233.
Complainant's Exhibit 2 Darling, (10 N. P.).
Complainant's Exhibit 3 Darling, (10 N. P.).
Complainant's Exhibit 85 Darling, (10 N. P.).
Complainant's Exhibit 86 Darling, (10 N. P.).

A. H. Hogeland— 2 G. N. 29.
4 G. N. 1609.
4 G. N. 1619.

John F. Stevens— 2 G. N. 444.
Complainant's Exhibit 2 Hogeland, (6 G. N.).

Alvin S. Cutler— 3 M. & St. L 924:940.

Defendant's Evidence.

Dwight C. Morgan— 5 N. P. 1949-1954.
3 G. N. 1455.
Defendant's Exhibits "OO" and "QQ" Morgan, (9 N. P.).
Defendant's Exhibit "C" Morgan, (5 G. N.).
Defendant's Exhibits "I" and "J" Morgan, (5 M. & St. L.).

"Items 12 to 28, Inclusive, and 31 to 34, Inclusive.

Northern Pacific Case and Great Northern Case.

As to the foregoing items in each of these two cases after allowing complainants for acquisition after State's estimates were made, it appears that the total value thereof as conceded by the State exceeds the amount claimed by the complainants who in their brief assume a substantial agreement. It is determined that in the Northern Pacific case the valuation of said items in the aggregate amounts to the sum of $20,272,398.23 and in the Great Northern case to the sum of $28,838,580. The valuations placed on each of the items making up such aggregate valuations, respectively, by the witnesses for complainants, are found to be fair and reasonable and are made part of the summary schedule to follow. As the aggregate is less than conceded by the State it cannot complain.

Minneapolis & St. Louis Case.

In this case there was little difference between the parties as to the items from 12 to 26 and the differences in these and some other items were compromised and figures taken accordingly and appear in the summary to follow. These figures so taken represent the Master's judgment of the fair value of the items respectively."

Note.—For the reasons stated in the foregoing part of the Master's report it does not appear to be necessary to note the evidence in detail showing the proof supporting these items. It is contained however in the various exhibits and references to testimony heretofore indicated.

"**Item 30—Engineering, Superintendence and Legal Expenses.**

Northern Pacific Case.

Amount allowed.....$2,633,946.00

This is 4½ per cent on Item 1 to 28, same as in Great Northern case.

Great Northern Case.

Amount allowed.....$3,867,040.00

This is obtained by taking 4½ per cent on Items 1 to 28, inclusive, and is sufficient to cover general expenses, for which a separate claim is made.

Minneapolis & St. Louis Case.

Amount allowed.....$690,364.00

For valuation of Items 31 to 34 in this case see summary to follow."

Note.

Complainant's Evidence.

William L. Darling— 2 N. P. 8:20.
7 N. P. 3227.

John B. Berry— 3 N. P. 744.
Complainant's Exhibit 2, Darling, (10 N. P.).
Complainant's Exhibit 3, Darling, (10 N. P.).
Complainant's Exhibit 85, Darling, (10 N. P.).
Complainant's Exhibit 26, Berry, (10 N. P.).

A. H. Hogeland— 2 G. N. 46.
Complainant's Exhibit 2, Hogeland, (6 G. N.).

Alvin S. Cutler— 3 M. & St. L. 926.
Complainant's Exhibit 30 Cutler, 6 M. & St. L.

Defendant's Evidence.

Dwight C. Morgan— 5 N. P. 1849-1854.
5 N. P. 2037-2040.
3 G. N. 1457.

Defendant's Exhibits "OO" and "QQ," Morgan, (9 N. P.).

Defendant's Exhibit "C," Morgan. (5 G. N.).

Defendant's Exhibits "I" and "J," Morgan, (5 M. & St. L.).

"Item 36—Freight on Construction.

Northern Pacific Case.

In this case this item has not been kept separately but is included as a part of the cost of all items requiring such service.

Great Northern Case.

Amount allowed.....$1,700,043.00

The evidence clearly favors the view that this item should be allowed at regular tariff rates; that it is more economical to make use of other roads as far as possible in handling material to the front and that now full tariff rates must be paid for such service rather than the conventional five mills per ton per mile which seems to have formerly obtained. As the law now is, no favors can be extended to railroad companies or reductions made in the interest of reciprocity.

Minneapolis & St. Louis Case.

This and Item 37 are to be taken in connection with Item 39 and is covered by it."

Note.

Complainant's Evidence.

William L. Darling— 3 N. P. 945-952.
7 N. P. 3219-3220.
Complainant's Exhibit 2, Darling, (10 N. P.).
Complainant's Exhibit 3, Darling, (10 N. P.).
Complainant's Exhibit 85, Darling, (10 N. P.).

A. H. Hogeland— 2 G. N. 48-51.
Complainant's Exhibit 2, Hogeland, (6 G. N.).

Alvin S. Cutler— 3 M. & St. L. 927.
Complainant's Exhibit 28, Cutler.
Use of Tariff Rates explained and defended.
Higher cost of movement during construction.
Foreign lines used as far as possible.

James J. Hill— 3 G. N. 1255-1258.
John F. Stevens— 2 G. N. 459.
W. L. Darling— 7 N. P. 3219.
A. H. Hogeland— 3 G. N. 1004.

Defendant's Evidence.

Dwight C. Morgan— 5 N. P. 1964-6.
5 N. P. 2062.
4 G. N. 1381.
4 G. N. 1464.
Defendant's Exhibits "OO" and "QQ," Morgan, (9 N. P.).
Defendant's Exhibit "C," Morgan. (5 G. N.).
Defendant's Exhibits "I" and "J," Morgan, (5 M. & St. L.).

"Item 37—Contingencies.

Northern Pacific Case.

Amount allowed.....$3,710,479.00

The amount here allowed is five per cent on Items 1 to 34 and corresponds to the State's method, and in view of present knowledge—making definite many

things which would in a road projected into new territory be uncertain—the amount seems ample.

Item 37—Great Northern Case.

Amount allowed.....$4,367,826.00

This amount is obtained by allowing ten per cent on all items into which labor enters and eliminates items a knowledge of which has been acquired by the actual construction of road. The State's method would have somewhat increased this amount."

Note.

Complainant's Evidence.

William L. Darling— 2 N. P. 12:549.
Howard Elliott— 4 N. P. 1240.
J. B. Berry— 3 N. P. 738-743.
James J. Hill— 3 G. N. 1253.
A. H. Hogeland— 2 G. N. 40.
3 G. N. 1073.
John F. Stevens— 2 G. N. 444.

Complainant's Exhibit 2, Darling, (10 N. P.).
Complainant's Exhibit 3, Darling, (10 N. P.).
Complainant's Exhibit 85, Darling, (10 N. P.).
Complainant's Exhibit 2, Hogeland, (6 G. N.).
Complainant's Exhibit 56, Hogeland, being statement showing actual cost of all work done under authorities for expenditures on G. N. 1903-1907, inclusive, as compared with estimated cost and percentage that actual cost exceeded estimates. (6 G. N.).
Complainant's Exhibit 28, Cutler, (6 M. & St. L.).

Defendant's Evidence.

Dwight C. Morgan— 5 N. P. 2041-2065.
5 N. P. 2115-2117.

Defendant's Exhibits "OO" and "QQ," Morgan, (9 N. P.).
Defendant's Exhibit "C," Morgan. (5 G. N.).
Defendant's Exhibits "I" and "J," Morgan, (5 M. & St. L.).

"Item 38—Stores and Supplies in Minnesota.

Northern Pacific Case.

Amount allowed.....$2,658,976.00

Item 38—Great Northern Case.

Amount allowed.....$3,240,178.00

Item 38—Minneapolis & St. Louis Case.

Amount allowed..... $238,589.00"

Note.

Complainant's Evidence.
William L. Darling—
Complainant's Exhibit 2, Darling, (10 N. P.).
Complainant's Exhibit 3, Darling, (10 N. P.).
Complainant's Exhibit 85, Darling, (10 N. P.).

Howard Elliott— 4 N. P. 1226.
William L. Darling— 2 N. P. 16.
A. H. Hogeland— 2 G. N. 54.
Complainant's Exhibit 2, Hogeland, (6 G. N.).
James J. Hill— 3 G. N. 1299.
Alvin S. Cutler— 3 M. & St. L. 911.
Complainant's Exhibit 28, Cutler, 6 M. & St. L.

Defendant's Evidence.
Dwight C. Morgan— 5 N. P. 1967.
3 G. N. 1466.
Defendant's Exhibits "OO" and "QQ," Morgan, (9 N. P.).

Defendant's Exhibit "C," Morgan. (5 G. N.).
Defendant's Exhibits "I" and "J," Morgan, (5 M. & St. L.).

"Item 39—Interest During Construction.

Northern Pacific Case.

Amount allowed.....$7,386,215.00

This is interest at four per cent for 2½ years on Items 1 to 36.

Item 39—Great Northern Case.

Amount allowed.....$17,880,150.00

This allowance is based upon four percent on Items 1 to 36 for a period of four years, during which time it is assumed the aggregate of such items would average the amount paid out without a return. It is fair to allow interest on payments made until as the result of such payments revenue is derived, and this is recognized by all the authorities as well as by the State's witnesses. This is an interest allowance, however, and is not analagous to returns based on the hazards of the business, as are rates. Returns from savings banks' accounts and the better class of bonds are less than four per cent, and under all the circumstances interest at this rate seems fairly compensatory and is what is claimed and allowed in the Northern Pacific Case.

Minneapolis & St. Louis Case, Items 36, 37 and 39.

Amount allowed.....$1,834,880.00

In view of testimony, ten per cent of Items from 1 to 34, inclusive."

Note.

Complainant's Evidence.

William L. Darling— 2 N. P. 13.
7 N. P. 3239.
John B. Berry— 3 N. P. 742-745.
Howard Elliott— 4 N. P. 1254.
James J. Hill— 3 G. N. 1257:1267.
John F. Stevens— 2 G. N. 447.
A. H. Hogeland— 2 G. N. 52:161.

Evidence to effect that there are ordinarily no net earnings from commercial business hauled during construction and therefore no credit can be allowed for such earnings upon interest during construction.

James J. Hill— 3 G. N. 1257.
Howard Elliott— 4 N. P. 1254.
John F. Stevens— 2 G. N. 447.
Complainant's Exhibit 2, Darling, (10 N. P.).
Complainant's Exhibit 3, Darling, (10 N. P.).
Complainant's Exhibit 85, Darling, (10 N. P.).
Complainant's Exhibit 2, Hogeland, (6 G. N.).
Complainant's Exhibit 28, Cutler—(6 M. & St. L.).

Defendant's Evidence.

Dwight C. Morgan— 5 N. P. 1855-1859.
5 N. P. 1936-1937.
5 N. P. 2047-2053.
Defendant's Exhibits "OO" and "QQ," Morgan, (9 N. P.).
Defendant's Exhibit "C," Morgan—(5 G. N.).
Defendant's Exhibits "I" and "J," Morgan—(5 M. & St. L.).

"Item 40—Interest in Terminal Properties.

Northern Pacific Case.

Amount allowed.....$2,204,342.00

The situation of this company with respect to the St. Paul Union Depot and Minnesota Transfer companies is identical with that of the Great Northern company, to be hereafter explained.

With respect to the Duluth Union Depot and Transfer Company, the Northern Pacific Company owns all the stock and makes use of the property of the company as its own by the operation of its line of road; it is simply an operating tool and transacts no business on its own account or otherwise than as an agent of the Northern Pacific Company, and its properties should be valued as belonging to that company.

In this case it was conceded at the close of the argument before the Master that the Big Forks and International Falls Railway and the Minnesota and International Railway had not been made to appear as part of the Northern Pacific system, and they have not been included in the valuations which have been made.

Item 40—Great Northern Case.

Amount allowed..... $1,186,191.00

This is the valuation of the one-tenth interest owned by the company in the Minnesota Transfer Railway and of the one ninth interest in the St. Paul Union Depot properties. Such ownership is not direct but is evidenced by stock in subsidiary corporations in whose name the properties are carried and operated for the sole and exclusive benefit of the respective railroad companies which own the stock and make use of the properties as an operating tool and as part of the properties of their respective lines of railroad. These companies are substantially joint owners of the

property and as a matter of convenience and to more readily adjust accounts as between themselves growing out of the several use by each of them as so made of it, an agency for the purposes is created by an intermediary corporation under their direct control. To such agent each pays for such use of the property and charges the amount paid in its expense account, and dividends, if any, go into the revenue account as operating expenses and revenues.

These subsidiary corporations are mere agencies operated for and wholly dependent upon the railroad companies who own the stock and in no sense are they independent enterprises engaged in business on their own account. In the evidence and all the proceedings before the Master it has been by all parties assumed that such was their character, and this being so the properties thereof should be considered as property of the companies to the extent of their respective interests as represented by stock.

These terminal properties, located as they are and used for receiving and discharging passengers and for receiving, handling, transferring and forwarding freight, are of exceptional value and importance and the facilities so provided are found to be fully worth the amount claimed therefor by complainants and such amount has been taken in each of the cases.

Item 40—Minneapolis & St. Louis Case.

Amount allowed.....$1,186,191.00

The interest of this company in the Minnesota Transfer and St. Paul Union Depot property is apparently the same as in the other cases and is allowed for the reasons before stated.

A claim was made in the Great Northern case for lines under construction, but the evidence fails to show why they should constitute an element of rate-making value. Until they become completed roads and are made part of the system so as to produce revenue, they should not be regarded. Upon completion it will be noted that interest during construction is allowed as an element of reproduction cost, which—when it shall become entitled to recognition—will fully cover the claim so made."

Note.

Minnesota Transfer Railway Company:

James J. Hill— 3 G. N. 1291-1293.
A. H. Hogeland— 2 G. N. 56.
William L. Darling— 2 N. P. 16.
Complainant's Exhibit 89 N. P., (10 N. P.).
Complainant's Exhibit 85 Darling, (10 N. P.).
Dwight C. Morgan— 5 N. P. 2265.
Defendant's Exhibit "VV" Morgan, (9 N. P.)

St. Paul Union Depot Company:

William L. Darling— 2 N. P. 16.
A. H. Hogeland— 2 G. N. 56.
Complainant's Exhibit 85 Darling, (10 N. P.).
Complainant's Exhibit 2 Hogeland, (6 G. N.).
Dwight C. Morgan— 5 N. P. 2262.
Defendant's Exhibit "TT" Morgan, (9 N. P.).

Duluth Union Depot & Transfer Company:

Complainant's Exhibit 85 Darling, (10 N. P.).
Defendant's Exhibit "UU" Morgan, (9 N. P.).
William L. Darling— 2 N. P. 16.
Dwight C. Morgan— 5 N. P. 2262.

"SUMMARY OF VALUATIONS OF PHYSICAL PROPERTIES.

Itemized in each of the three suits.

Northern Pacific Case.

Items.		
1.	Lands for right of way, yards and terminals	$21,024,562
2.	Grading, clearing and grubbing.	12,331,541
3.	Protection work, rip-rap, retaining walls	374,091
4.	Tunnels	253,250
5.	Cross-ties and switch-ties	3,657,576
6.	Ballast	1,960,969
7.	Rails	5,645,307
8.	Track fastenings	727,228
9.	Switches, frogs and railroad crossings	303,717
10.	Track laying and surfacing	1,600,591
11.	Bridges, trestles and culverts	3,586,063
12.	Track and bridge tools	28,073
13.	Fences, cattleguards and signs	471,609
14.	Stockyards and appurtenances	37,098
15.	Water stations	436,489
16.	Coal stations	120,039
17.	Stations, buildings and fixtures	920,423
18.	Miscellaneous buildings	1,054,874
19.	Steam and electric power plants, gas plants	196,338
20.	General repair shops	1,162,934
21.	Shop machinery and tools	529,322
22.	Engine houses, turntables and cinder pits	1,026,346
23.	Track scales	38,520
24.	Docks and wharves	768,306
25. 26.	Interlocking plants and other signal apparatus,	114,430
27. 28.	Telegraph and telephone lines	285,145
28½.	General office furniture	73,654

29.	Solidification of roadbed. (Absorbed in above.)	
	Total 1 to 28.....	$58,728,685
30.	Engineering, superintendence, legal expenses, 4½ per cent 1 to 28	$ 2,785,036
31.	Locomotives	3,454,040
32.	Passenger equipment	1,349,829
33.	Freight car equipment.....	7,519,722
34.	Miscellaneous equipment	372,477
35.	Marine equipment (none).	
	Total items 1 to 34.....	$74,209,789
36.	Freight on construction material —absorbed.	
37.	Contingencies, 5 per cent 1 to 34.	$ 3,710,479
38.	Stores and supplies in Minnesota	2,658,976
39.	Interest during construction, 4 per cent 2½ years, Items 1 to 36...	7,420,957
40.	Interest in terminal properties, St. Paul depot, Duluth depot, Minnesota Transfer	2,204,344
		$90,204,545"

"Great Northern Case.

Items.		
1.	Lands for right of way, yards and terminals	$ 25,172,650
2.	Grading, clearing and grubbing	21,685,802
3.	Protection work, rip-rap and retaining walls	850,069
4.	Tunnels (none).	
5.	Cross-ties and switch-ties.....	5,460,809
6.	Ballast	3,861,360
7.	Rails	9,053,977
8.	Track fastenings	2,087,615
9.	Switches, frogs and railroad crossings	300,519

10.	Track laying and surfacing....	2,207,753
11.	Bridges, trestles and culverts...	6,664,729
12.	Track and bridge tools.....	54,450
13.	Fences, cattleguards and signs..	448,864
14.	Stockyards and appurtenances..	81,600
15.	Water stations	569,900
16.	Coal stations	202,200
17.	Station buildings and fixtures...	1,561,200
18.	Miscellaneous buildings	1,446,445
19.	Steam and electric power plants and gas plants	413,752
20.	General repair shops.....	1,070,765
21.	Shop machinery and tools.....	953,531
22.	Engine houses, turntables and cinder pits	727,100
23.	Track scales	39,700
24.	Docks and wharves.....	37,500
25.	Interlocking plants	193,268
26.	Signal apparatus	116,046
27.	Telegraph lines and appurtenances	634,744
28.	Telephone lines and appurtenances	37,893
29.	Solidification of roadbed (Absorbed in above.)	
	Total 1 to 28.....	$ 85,934,241
30.	Engineering, superintendence, legal expenses, 4½ per cent 1 to 28	$ 3,867,040
31.	Locomotives	5,469,270
32.	Passenger equipment	1,886,178
33.	Freight car equipment.....	12,411,265
34.	Miscellaneous equipment	482,909
35.	Marine equipment (none).	
	Total 1 to 34.....	$110,050,903
36.	Freight on construction material	1,700,043
		$111,750,946

37.	Contingencies	4,367,826
38.	Stores and supplies in Minnesota	3,240,178
39.	Interest during construction (4 per cent four years 1 to 36)..	17,880,150
40.	Interest in terminal properties..	1,186,191
		$138,425,291"

"Minneapolis & St. Louis Case.

Items.		
1.	Lands for right of way, yards and terminals	$ 5,999,397
2.	Grading, clearing and grubbing..	2,551,960
3.	Protection work, rip-rap, retaining walls	52,240
4.	Tunnels (none).	
5.	Cross-ties and switch-ties.....	1,149,829
6.	Ballast	357,855
7.	Rails	1,540,392
8.	Track fastenings	258,561
9.	Switches, frogs and railroad crossings	66,807
10.	Tracklaying and surfacing.....	384,751
11.	Bridges, trestles and culverts....	1,025,827
12.	Track and bridge tools.....	27,791
13.	Fences, cattleguards and signs...	141,606
14.	Stockyards and appurtenances...	55,704
15.	Water stations	80,637
16.	Coal stations	25,682
17.	Station buildings and fixtures....	239,434
18.	Miscellaneous buildings	32,901
19.	Steam, electric power and gas plants	58,050
20.	General repair shops.....	180,588
21.	Shop machinery and tools.....	101,875
22.	Engine houses, turntables and cinder pits	148,303
23.	Track scales	8,421
24.	Docks and wharves (none).	
25.	Interlocking plants	15,674
26.	Signal apparatus	2,594

27.	Telegraph lines and appurtenances	27,109
28.	Telephone lines and appurtenances (none).	
29.	Solidification of roadbed. (Absorbed in above).	
	Total Items 1 to 28.....	$14,533,988
30.	Engineering, superintendence and legal expenses, 4¾ per cent 1 to 28	$ 690,364
31.	Locomotives	698,163
32.	Passenger equipment	341,006
33.	Freight car equipment.....	1,998,345
34.	Miscellaneous equipment	86,938
35.	Marine equipment (none).	
	Total Items 1 to 34.....	$18,348,804
36.	(Included in Item 39.)	
37.	(Included in Item 39.)	
38.	Stores and supplies.....	238,589
39.	Freight on construction material, contingencies, interest during construction	1,834,880
40.	Interest in terminal properties...	1,186,191
		$21,608,464"

VIII.

"Depreciation.

Having thus found the cost of reproduction new of these several railroads properties, the question remains what if anything shall be deducted for depreciation.

It is established that the roadbed is constantly increasing in value. It becomes solidified, embankments and slopes of excavations become settled and stable and so the better resist effects of rains and frost. It becomes adjusted to surface drainage and the adjustment is made permanent by concrete structures and rip-rap, and in other ways a roadbed long in use is far more valuable than one newly constructed. On the other hand, everything on and above the road bed depreciates from wear and weather-stress. The life of a tie is from eight to ten years only. Structures become antiquated, inadequate and more or less dilapidated. Ballast requires renewal, tools and machinery wear out, cars, locomotivs and equipment, as time goes on, are worn out or discarded for newer types. A large part of the depreciation, however, is taken care of by constant repairs, renewals, additions and replacements, a sufficient sum being annually set aside and devoted to this purpose, so that this, with appreciation of roadbed and adaptation to the needs of the country and of the public served, together with working capital hereinafter mentioned fully offsets all depreciation and renders the physical properties of the road not less valuable than their cost of reproduction new. This

conclusion is fully supported by the evidence and also justifies the language hereinbefore cited from the Missouri, Kansas & Texas Railway case, decided by Mr. Justice Hook.

There is another element which may properly be considered in connection with the question of depreciation, and as an offset to it. It is necessary that the companies should have on call a large sum of money for the conduct of the business and to meet emergencies. No doubt a large part of it draws a low rate of interest while on deposit in bank, but it must be that very considerable amounts are idle and unproductive and must be considered as an element of value in the matter of rate-making.

In view of all the foregoing considerations it follows without question that there should be no deductions on account of depreciation."

Note.

APPRECIATION IN VALUE—ELEMENTS AND CONSIDERATIONS—OVERCOMES DEPRECIATION.

Complainant's Evidence.

James J. Hill—	3 G. N. 1299.
John F. Stevens—	2 G. N. 509:541:550.
A. H. Hogeland—	2 G. N. 1007.
Howard Elliott—	4 N. P. 1249.
J. B. Berry—	3 N. P. 747.
William L. Darling—	2 N. P. 29.
	7 N. P. 3228:3247.

Defendant's Evidence.

Dwight C. Morgan—	5 N. P. 1833-1846:1859-1864.
	5 N. P. 2065-2069.
	5 N. P. 2279-2281.

Complainant's Exhibit, Morgan N. P., (10 N. P.).
Sub-title "Adaptation and Solidification."
Working Capital.

James J. Hill— 3 G. N. 1204:1283.
Howard Elliott— 4 N. P. 1245.

IX.

"Stocks and Bonds as Affecting Value.

There was produced before the Master reliable evidence as to the average market value of the stocks and bonds issued by the Northern Pacific Company for a period of five years ending April 30, 1908, and then outstanding, such average value amounting in the aggregate to the sum of $509,824,723. (Exhibit 17—Gray.) The par value April 30, 1908, of the stock was $215,539,634.99 and of the bonds, $190,256,577.66. Total $405,796,392.65. (Exhibit 14—Gray.)

The total track mileage claimed by Complainant's Exhibit 2—Darling—is 8,146.45 miles. From this must be deducted 150.65 miles for the Minnesota and International line, and Big Forks & International Falls line, improperly included, and also lines in Manitoba under lease and not operated as part of the system, amounting approximately to 300 miles, the exact amount not being definitely shown by the evidence. This leaves 7,695.80 miles. The track mileage in Minnesota is 1,625.20 or substantially 21 per cent of the whole. Taking this per cent of the stock and bond average market valuation for said five year period gives $107,063,191, which considerably exceeds

the cost of reproduction new, but it must be noted that the value of stock is based on all the assets of the company and is not limited to value of property to public service, and its balance-sheet for the whole system of April 30, 1908 (Exhibit CC—Gray), shows a clear surplus $52,900,073, while some of its assets notably the Northwestern Improvement Company stock, is apparently of far greater value than as listed. Assets and property not devoted to public service have not been valued, and as they are a large element in stock valuation it follows that value of bonds and stocks is wholly unreliable and cannot be used in these cases as an element in determining the value of operating property or as a basis for rate-making."

Note.

Northern Pacific Case.

Evidence relating to Capitalization.

H. A. Gray, Comptroller.

History of organization—previous company—
2 N. P. 260.

Outstanding stock and bonds on Aug. 31, 1896,
2 N. P. 264.

Fixed charges at that time and reduction after reorganization, 2 N. P. 265.

Complainant's Exhibit 14, Gray, being statement of outstanding stock and bonds, April 30, 1908 (10 N. P.), 2 N. P. 266.

Complainant's Exhibit 17, Gray, being statement of average market value of bonds and stock for period of five years ending April 30, 1908, (10 N. P.), 2 N. P. 271.

Complainant's Exhibit 18, Gray, being statement of stock outstanding and dividends paid each year, 1880 to 1908, (10 N. P.), 2 N. P. 272.

Complainant's Exhibit 19, Gray, being statement of average bonds outstanding for each year 1880 to 1896, inclusive, and interest on same (10 N. P.), 2 N. P. 273.

Complainant's Exhibit 20, Gray, being statement of interest on mortgage debt and dividends on stock from Sept. 1, 1896, to April 30, 1908, (10 N. P.), 2 N. P. 274.

Cross-Examination, 2 N. P. 275-416.

Cross-Examination, 3 N. P. 592-718.

Defendant's Exhibit "U," Gray, being statement showing disposition of Northern Pacific Consolidated Bonds as result of reorganization Sept. 1, 1896 (9 N. P.), 3. N. P. 595.

Defendant's Exhibit "W," Gray, being Report of Reorganization Committee, Plan of Reorganization, etc. (9 N. P.), 3 N. P. 669.

Defendant's Exhibit "Z," Gray, being statement of Principal Interest and Dividend obligations before and after reorganization (9 N. P.), 3 N. P. 676.

Redirect-Examination, 3 N. P. 905.

Financial History of N. P. R. R. Co., 3 N. P. 906-930.

Re-Cross-Examination, 4 N. P. 1162.

Redirect-Examination, 4 N. P. 1211.

Howard Elliott—

Testimony regarding Reserve Funds (Ex. "CC" Gray), 4 N. P. 1279.

Testimony regarding Profit and Loss, 4 N. P. 1282.

Testimony regarding Average Dividends, 4 N. P. 1283.

Cross-Examination, 4 N. P. 1289.
Defendant's Exhibit "NN," Elliott, being Balance Sheet of Northwestern Improvement Company (9 N. P.), 4 N. P. 1342.
History of Northwestern Improvement Company and Statement of Assets,
8 N. P. 3556.

"In the Great Northern case, the average market value of stocks and bonds for five years ending June 30, 1908, was shown to be $452,363,804. (Exhibit 67—Drew), par value $263,078,242.42 of average amount outstanding. The mileage in Minnesota is about 32.59 per cent of the total mileage, so that of this stock and bond average market valuation for said five-year period the amount to be assigned to Minnesota on a track-mileage basis would be $147,425,363. Of this amount a very considerable sum must be predicated on property not devoted to the public service, thus reducing the proportion assignable to Minnesota mileage.

At time suit was brought in the Great Northern Case the par value of stock was $149,577,500 and of bonds was $83,119,939. June 30th, 1908, par value of stock was $209,962,750 and of bonds was $97,955,939.39; total $307,918,689.39. (Ex. 54—Parker.)"

Note.

Great Northern Case.

Evidence relating to Capitalization.
F. H. Parker— 3 G. N. 1133.
Complainant's Exhibit 54, Parker, being An-

nual Report of Great Nothern Railway Company for year ended June 30, 1908 (6 G. N.), containing on

p. 2—Statement of Capital Stock and Disposition of proceeds of Capital Stock Issued:

p. 5—Bonded Debts

p. 34—Condensed General Balance Sheet

p. 36—Statement of Bonds and Stock outstanding for which Great Northern Railway Company is responsible.

Complainant's Exhibit 67, Drew, (4 G. N. 2094), being Statement of Average Market Value of Stock and Bonds of Great Northern Railway Company (and Proprietary Companies) outstanding for period of five years ended June 30, 1908.

"In the Minneapolis & St. Louis case the par value of stocks and bonds in 1908 was shown to be $30,011,800. The market value of stocks and bonds in 1908 was shown to be $22,006,197, (Exhibit 6 and 7—Scott), which, apportioned on basis of mileage owned by the company, of which about sixty per cent is in Minnesota, gives a valuation assignable to the State of $13,203,718, or about one-fifth less than the value of property as conceded by the State within Minnesota and thirty per cent less than its value as found by the Master on the reproduction basis."

Note.

Minneapolis & St. Louis Case.

Evidence Relating to Capitalization.

Lemuel G. Scott, Auditor—

2 M. & St. L. 1.

Complainant's Exhibit 5, Scott, being statement of Funded Debt April 30, 1908, (6 M. &. St. L.), apportioned on basis of road mileage.
2 M. & St. L. 9.

Complainant's Exhibit 6, Scott, being statement of Funded Debt April 30, 1908, (6 M. & St. L.), apportioned by localizing mortgages to states where possible and apportioning remainder on road mileage basis.
2 M. & St. L. 11.

Complainant's Exhibit 7, Scott, showing Capital Stock and Bonds, par value and average market values on April 30, 1908, (6 M. & St. L.).
2 M. & St. L. 13.

Complainant's Exhibit 7-A, Scott, showing Capital Stock and Bonds, par value and average market values on April 30, 1908, (6 M. & St. L.).
3 M. & St. L. 607.

"Stock valuations are subject to great fluctuation from causes wholly foreign to the intrinsic values of properties to be taken as a basis of rate-making and have little commercial stability. It is impossible to determine with any degree of certainty the particular elements which from time to time cause such fluctuations and determine the market value of such stocks and to separate the same from the value of properties devoted to public use and decide what proportions thereof shall be assigned to each. Prof. Henry C. Adams, statistician of the Interstate Commerce Commission, has this to say in respect to stock valuations:

> 'This is no place to enter upon a discussion of the nature and classification of different kinds of value, but a word of caution may be allowed in order to guard against an unwarranted use of the figures here submitted. The commercial

valuation of railroad property, in so far as it depends on income arising from the sale of transportation, is the result, among other things, of an established schedule of freight and passenger rates, from which it follows that such a valuation cannot be used for determining the reasonableness or unreasonableness of the rates in question. The solution of the rate problem demands a separate valuation of the physical property.'

Valuation of properties for purpose of taxation would include all the properties of the corporation whether devoted to the public service or not, and in such case the market value of stocks and bonds issued by it would be an important element of value."

X.

"Original Cost of Construction.

In the Northern Pacific, the Great Northern and Minneapolis & St. Louis cases a large amount of evidence was produced before the Master for the purpose of showing actual cost of construction of the entire railroad systems from the organization of the original companies and by them and by their successors, the present companies, down to April 30, 1908. This could be shown only by the books and records of the two companies, the Northern Pacific and Great Northern, and in the early history of the original companies these are somewhat obscure and uncertain and, by reason of lapse of time, cannot be verified by other proof.

The investment cost, in the Northern Pacific case, amounts to the sum of $369,252,755. In this aggre-

gate is included an item of interest during construction amounting to $4,534,882, which is a proper credit, for reasons before stated.

There is also included items aggregating $24,709,-164 for discounts made and commissions paid in disposing of its bonds. This, of course, was a necessary and proper expense of the company, and if required to render an accounting it would be entitled to take credit therefor, just as it would be allowed in an accounting demanded with respect to any other business in which any corporation or private person might be engaged. It cannot be said, however, that it is money which has actually gone into the road, but rather an expense which the company incurs for the purpose of procuring such money. If rate-making is to be based upon actual cost, it would seem that such cost must be measured by the money necessarily expended in producing the contruction without regard to whether those undertaking the enterprise have the same or must borrow for the purpose—a matter in which the public has no concern. If allowed interest during construction on the money invested, more should not be asked, erwise, the rate would be directly affected by the good credit or otherwise of those undertaking the work. It seems that formerly and down to 1907 the Interstate Commerce Commission permitted a credit for this item of discount but now disallow it.

The total investment of $369,252,755 above mentioned also includes an item of $32,573,036, the basis of which is an item found in an old ledger and noted in Exhibit 28—Gray as 'Claims of old stockholders

recognized in reorganization representing net cost in issue of new stock less proceeds of lands, $32,573,036.15,' and for which stock was issued and credit taken therefor. It seems probable that this stock was issued without consideration, and the fact that it was never included in the annual reports to the State, as shown in Exhibit V, tends to discredit it, and as there is no supporting evidence it should be disallowed. With these deductions, the cost of construction account is reduced to $312,243,555.

The Minnesota track mileage, as before stated, is substantially 21 per cent of the track mileage of the whole system and if the above cost were proportioned accordingly the amount assignable to the State is 21 per cent of $312,243,555, or a total sum of $65,571,462. This is considerably less than the valuation of the physical properties as found and makes no allowance for appreciation of property incident to the growth or prosperity of the country in which the company is entitled to share."

Note.

Northern Pacific Case.

Evidence Relating to Cost of Property.

H. A. Gray, Comptroller—
2 N. P. 259.

Book Cost of property acquired under decree of foreclosure September 29, 1875,
2 N. P. 263.

Book Cost to August 31, 1896,
2 N. P. 264.

Cost at Reorganization—Charges, etc.,
2 N. P. 267.

Complainant's Exhibit 15, Gray, being statement of Cost of Property 1875 to April 30, 1908 (10 N. P.). 2 N. P. 269.

Complainant's Exhibit 16, Gray, being statement showing sources from which funds were derived for Additions to Property, Sept. 1, 1896, to April 30, 1908, (10 N. P.) 2 N. P. 270.

Cross-Examination, 2 N. P. 275-416.

Cross-Examination, 3 N. P. 592-718.

Defendant's Exhibit "V," Gray, being statement of Cost of Construction and equipment Sept. 1, 1876, to June 30, 1907, (9 N. P.). 3 N. P. 610.

Defendant's Exhibit "W," Gray, being Report of Reorganization Committee, etc. (9 N. P.) 3 N. P. 669.

Defendant's Exhibit "Y," Gray, being Memorandum of Syndicate Profits (9 N. P.). 3 N. P. 673.

Defendant's Exhibit "AA," Gray, being statement of cost of constructed roads and interests in Terminal Companies acquired by N. P. R. R. Co., (9 N. P.). 3 N. P. 685.

Defendant's Exhibit "BB," Gray, being copy of journal entry Sept. 1, 1896, (9 N. P.). 3 N. P. 709.

Defendant's Exhibit "CC," Gray, being Condensed Balance Sheet, April 30, 1908, (9 N. P.). 3 N. P. 715.

Defendant's Exhibit "EE," Gray, being Statement of Additions and Betterments charged to Capital to June 30, 1907, (9 N. P.). 3 N. P. 717.

Redirect-Examination, 3 N. P. 905.

Financial History of N. P. R. R. Co., 3 N. P. 906-930.

Complainant's Exhibit 28, Gray, being statement of difference between defendant's Exhibit "V" of Cash Cost and Gray Exhibit 15, (9 N. P.). 3 N. P. 932.

Re-Cross-Examination, 4 N. P. 1162.
Defendant's Exhibit "MM," Gray, being statement of amount of cost invested in Railway, etc., (9 N. P.). 4 N. P. 1163.
Re-Direct-Examination, 4 N. P. 1211.

"In the Great Northern case, the balance-sheet of the company of date June 30, 1908, shows the book valuation of property for the entire system devoted to the public service to amount to the sum of $319,-681,815.

Upon production of their books and examination made thereof by the State's accountants this amount seems to be reduced to the sum of $295,401,213 by reason of disallowance of the following items: First, when in 1879 this company's immediate predecessor, the St. Paul, Minneapolis & Manitoba Railway Company, took over the properties from the latter's predecessor, the St. Paul & Pacific Railroad Company, it seems to have arbitrarily increased the book valuation by $12,126,342. Not unlikely this includes cost of reorganization, taking over from the receiver a bankrupt road and putting it on its feet again under able and efficient management, but for such purpose the amount seems excessive. It may also include enhanced value attaching to property as a going concern under such management. There is no evidence in explanation.

Second, discount on sale of bonds, disallowed for reasons before stated, $4,794,867.

Third, difference between cost to the company of the stock of the Willmar & Sioux Falls Railway Company and its par value of $1,500,000, it being included

at the latter sum in its investment account, $831,275.

Fourth, actual cost of construction of the Willmar & Sioux Falls railroad was less than as included in investment account by $55,950.

Fifth, in the matter of the Eastern Railroad of Minnesota the book valuation or cost exceeds the actual cost of acquisition of Superior terminals and stock of Lake Superior, Terminal & Transit Company and of acquisition of the Duluth, Mississippi & Northern Railroad in the sum of $4,961,426.

Sixth, the book valuation or cost of stock of Duluth, Watertown & Pacific railroad exceeds the actual cost to the company in the sum of $724,161.

Seventh, the excess of book value over actual cost of Wadena & Park Rapids line, the Alton & Halstead line and the Red Lake Falls line amounts to $286,-581.

Eighth, book valuation of Minneapolis Union Railway line when taken over was arbitrarily increased in the sum of $500,000.

Total book valuation, as before stated, $319,681,-815; total of deductions as above, $24,280,602; balance, $295,401,213.

In explanation of some of the foregoing deductions it is to be kept in mind that as to acquired roads the question is not what it cost the company to take them over but what money has actually gone into their construction.

The total track mileage of the road's entire system is 8,528.98 miles, and of the part in Minnesota 2,779.30 miles, so that practically 32.59 per cent is in this state, and taking this per cent of $295 401,213 we have $96,271,255 as the book value of what has

actually been expended in construction and equipment of the road in Minnesota. Of course division on a mileage basis is for the most part arbitrary and unreliable."

Note.

Great Northern Case.

Evidence Relating to Cost of Property.

F. H. Parker— 3 G. N. 1133.

Complainant's Exhibit 54, Parker, being Annual Report of Great Northern Railway Company for year ended June 30, 1908 (6 G. N.) containing on

p. 2—Statement of Capital Stock and disposition of proceeds of Capital Stock issued—Cost of Properties, etc.;

p. 5—Bonded Debts;

p. 8—Purchase and Consolidation of Railways now a part of Great Northern Railway Company;

p. 34—Condensed General Balance Sheet showing Cost of Property;

p. 36—Statement of Bonds and Stock outstanding in hands of Public for which Great Northern Railway Company is responsible.

Lease dated February 1, 1890, from St. Paul, Minneapolis & Manitoba Railway Company to Great Northern Railway Company of all property as described (with certain exceptions) in consideration of payment of all interest on bonds, taxes and six per cent dividends on stock of St. Paul, Minneapolis and Manitoba Railway Company and other promises. 4 G. N. 2047.

Deed dated October 11, 1907, from St. Paul, Minneapolis & Manitoba Railway Company to Great Northern Railway Company conveying all property described in consideration

of $35,000,000, and assumption of all mortgages as described and other agreements.
4 G. N. 2007.

Abstract of Deeds, from sundry Railway Companies named to Great Northern Railway Company, conveying railway property now a part of Great Northern Railway Company for considerations specified.
4 G. N. 2093.

Conway W. Hillman—
State Accountant— 4 G. N. 1764.
Defendant's Exhibit K-1 (5 G. N.), being Memorandum of Cost of Road and Equipment—1st period—St. Paul & Pacific Railroad Company, 1872-1879. 4 G. N. 1770.
Exhibit K-2—Second Period,
St. Paul, Minneapolis & Manitoba Railway Co. 4 G. N. 1788.
Exhibit K-3—Third Period,
Willmar & Sioux Falls Railway Co.
4 G. N. 1819.
Exhibit K-4—Fourth Period,
Eastern Railroad of Minnesota.
4 G. N. 1826.
Exhibit K-5—Fifth Period,
Duluth, Watertown & Pacific Railroad Co.
4 G. N. 1837.
Exhibit K-6—Sixth Period,
Park Rapids & Leech Lake Railroad Co.
4 G. N. 1840.
Exhibit K-7—Seventh Period,
Consolidation of lines into Great Northern Railway Co.
4 G. N. 1841.
Exhibit K-8—Eighth Period,
Cost of Securities and Investments acquired in Companies named.
4 G. N. 1855.
Exhibit K-9—Ninth Period,
Additions to Eighth Period and summary of so-called Excess Costs deducted by witness.
4 G. N. 1861.

J. G. Drew, Comptroller, Great Northern Railway Company—
Analysis and Criticism of above
Hillman Exhibits and testimony of Hillman.
4 G. N. 1910.

"In the Minneapolis & St. Louis case the book cost of property and investments amounted to $30,572,-619. Deducting for discounts disallowed for reasons before stated leaves a remainder of $28,574,225. Dividing this on a mileage basis 59.94 per cent, assigns to Minnesota $17,127,390, and apportioned on a gross revenue basis over the entire system, 77.41 per cent assigns to Minnesota $22,119,307."

Note.

Minneapolis & St. Louis Case.

Evidence Relating to Capitalization.

Lemuel G. Scott, Auditor—
2 M. & St. L. 1.

Complainant's Exhibit 7, Scott, showing cost of property to April 30, 1908, (6 M. & St. L.)
2 M. & St. L. 13.

Complainant's Exhibit 7-A, Scott, showing cost of property to April 30, 1908, (6 M. & St. L.)
3 M. & St. L. 607.

Complainant's Exhibit 8, Scott, Cost of property April 30, 1908, apportioned amount states, (6 M. & St. L.).
2 M. & St. L. 14.

Defendant's Exhibit "D," Scott, being statement of Bonds issued to April 30, 1908, showing dates and purposes of issue, (5 M. & St. L.). 3 M. & St. L. 591.

Defendant's Exhibit "E," Scott, being statement showing dates and amounts of bonds sold, amount realized and discount, (5 M. & St. L.). 3 M. & St. L. 605.

Defendant's Exhibit "F," Scott, being Amendment to Stockholders Agreement of Reorganization of August 11, 1892, (5 M. & St. L.). 3 M. & St. L. 636.

Defendant's Exhibit "G," Scott, being Agreement of Consolidation of properties, April 20, 1881, (5 M. & St. L.). 3 M. & St. L. 644.

"For reasons before stated rates are not to be predicated on original investment. Prof. B. H. Meyer, of the Wisconsin University, an eminent railroad statistician who has given the matter very careful consideration, as appears from the so-called Wisconsin Buel rate case, in which he wrote the decision of the commission, says:

> 'Bearing in mind, however, that this is a commercial valuation, it is impossible to advance a single valid argument in favor of the acceptance of cost accounts as the equivalents of values. It would be nearer the truth to say that costs of railway properties have nothing to do with their values than to assert that the values of railway properties are identical with costs.'

And again,

> 'The method which satisfies in the highest degree the requirements of the valuation of railway systems as a whole as well as the distribution of the total values of such systems among states is the inventory method. This is a composite method, each constituent element in which is designed to solve one phase of the general problem of val-

uation and value distribution. The basal principle of the method is an engineer's estimate of the cost of reproduction of all physical properties new and in present condition, the latter being usually expressed in terms of per cent of the former.'

Again he has said,

> 'The cost-of-reproduction method carries with it a greater degree of demonstrable certainty and conviction than all the others which have been proposed.'

And again,

> 'Value of a railroad property, ascertained by the stock-and-bond method alone, cannot be used with fairness to carriers in cases involving important reductions in their rates.'

The Minnesota Railroad & Warehouse Commission in its report to the legislature which resulted in authority to incur the expense necessary to obtain the inventory appraisement made by it sets out very forcibly the value of such appraisement as an element or rate-making. It says:

> 'It is uniformly held that the cost of reproduction is one of the very important elements in determining what is a reasonable rate and certainly is the strongest kind of evidence of the fair value of the property. The Commission has always recognized the carrier's right to earn a reasonable return on a fair valuation of its property, and has always had this in mind in every rate adjustment it has made. The valuation will be of great value in sustaining the Commission and the legislature in pending legislation should the contention be made that the rates in contro-

versy will not produce a fair return on the property used, and it can be used in any further readjustment of rates that the Commission may deem it advisable or necessary to make.'

The Master is thus confirmed in his opinion that the cost of reproduction new is the fairest and most equitable basis upon which to predicate rates, both for the carrier and the public, and he has accordingly adopted it in these cases.

Good will and corporate franchises are not proper elements of such valuation. Patronage and good will of the public are its contributions to the success of the enterprise, for which it is not to be assessed. Corporate franchises are the free gift of the government conferred upon any organization willing to embark in such undertaking, but knowledge derived from experience, adaptation to the needs of the public and readiness to serve, together with physical appreciation of roadbed and a reasonable amount of working capital always on hand for immediate use are matters of value which will fully offset depreciation arising from use and weather-stress."

XI.

"Roads Constructed and Maintained Pursuant to Public Demand.

It is true of these lines of railway that they are efficiently, economically and honestly managed; that they have been located and constructed pursuant to a public demand and that the public rather than dispense with the service of any of them can well afford

and will gladly pay such rates as will produce a full and fair return on cost of their reproduction—such return as others engaged in business of similar character and of like hazards and uncertainties are accustomed to receive, and rates sufficiently high for such purpose would not be burdensome, unjust or unreasonable.

Abandonment of either of these roads would be a great public calamity, and if we could conceive of their being suddenly obliterated, their immediate reconstruction would follow in response to the public necessity, which shows that they must be worth what it would cost to reproduce them and that a return based on such cost will not be oppressive.

It is to be observed, however, that there is a marked difference in some respects between the location and surrounding conditions of the Northern Pacific and Great Northern roads, on the one hand, and the Minneapolis & St. Louis road, on the other. The former lines extend from the Head of the Lakes at Duluth and Superior and from the great commercial cities of St. Paul and Minneapolis to important seaboard cities on the Pacific coast and throughout their length, both within and beyond the state of Minnesota, connect with other important lines of railroad and exchange traffic therewith in large volume, and also have many and important branch lines reaching out into productive agricultural lands which operate as feeders and largely increase the business of the main lines. Their terminals at the Head of the Great Lakes and at the Pacific coast bring about the exchange of a large tonnage with vessels navigating those waters,

both domestic and foreign, and add largely to the volume of business.

The Minneapolis & St. Louis road, on the other hand, however, is so located that it cannot participate in these advantages and must largely depend on local and inland traffic for its business. It runs south from the inland cities of St. Paul and Minneapolis to Des Moines, with a branch to Storm Lake, Iowa, and a branch to the South Dakota grain fields. Along its entire line it comes in sharp competition with strong intersecting railroad lines, and, while as before stated, it subserves a useful public purpose and is operated in response to public demand, it can be maintained only by exercise of the highest economy and watchfulness in its operation and to suceed must be given greater latitude than is necessary with respect to the more favorably located and prosperous lines of railway. Necessarily, to get business its rates must conform to those existing on other roads wherever competition is an element, but when this does not exist it is entitled to rates not so controlled by competition, and within reasonable limits must, to exist, be given a free hand in the conduct of its business, as will later be made to appear when the consideration of rates is reached."

XII.

"Economy of Management.

It has been urged before the Master with reference to the lines of railway under consideration that the evidence discloses want of economical management

in that limited portions of the business were unremunerative and not infrequently resulted in loss.

If the convenience and demands of the public were disregarded, greater economy could doubtless be exercised. Full cars and long trains at fewer intervals would be a great saving of cost, and to this end produce could be stored in elevators awaiting shipment under the most economical conditions. Needless to say that this would result in great public inconvenience and dissatisfaction, and recourse to such methods is unthinkable. The carrier must properly yield to public demand and recoup for loss on other portions of its business.

It is also urged that as to some of the roads surplus lands and equipment are disclosed much beyond present needs. But it is good business sense to anticipate and prepare for the requirements of the near future. Readiness to serve is of the highest importance to those requiring service and an efficient management will, if practicable, take advantage of the markets and buy what will soon be needed when it can be obtained at a reasonable price and not wait until it *must* be had regardless of cost. Present patrons are not to be burdened for the benefit of those to be acquired in the distant future, but they can well afford to pay a somewhat higher rate that they themselves in the near future may enjoy a cheaper and better service. It is proper for the carrier not only to provide itself with ample facilities for the efficient conduct of its present business, but also to anticipate demands soon to be made as the country becomes more prosperous, and it is entitled to revenue sufficient for such purpose.

Having these considerations in mind, it does not appear that the service rendered or the property acquired and held for present and prospective needs are unreasonable or excessive or that any property has been improperly included as a basis of cost of reproduction for rate-making purposes."

XIII.

"Valuations of Entire System.

Complainants have offered considerable testimony for the purpose of establishing value of the physical properties of the whole system, both in the Northern Pacific and Great Northern cases, and they ask a finding of such valuation.

The State has confined its testimony as to value of such physical properties only as are in Minnesota. The Master does not consider a finding in the matter at all necessary in determining the controversies submitted to him, but as such finding is desired by complainants he concludes to make it.

In the Northern Pacific case there was testimony to the effect that the cost of reproduction of the physical properties of the entire system would amount to the sum of $526,779,016. This includes $28,913,981 for the Spokane, Portland & Seattle road, one-half of which is owned by the Northern Pacific Company and one-half by the Great Northern Company, the amount so taken being one-half of such cost. This road was, at the time evidence was submitted, under construction, did no commercial business, earned no revenue, and until completion could form no part of

the operating system. When completed its cost of reproduction will be enhanced by interest during construction and until then it forms no part of rate-making valuation. It is not included in the track mileage of the system hereinbefore found to amount to 7,695.80 miles.

There is also included in complainants' estimate the further sum of $4,116,874 for the Minnesota and Internationel and the Big Forks and International roads which, for reasons before given, must be deducted.

There has also been so included the further sum of $7,000,000 for lines in Manitoba which are under leases and form no part of the company's operating system.

Eliminating these items leaves a balance of $486,738,161.

Assuming, as we may, that there should be at least the same per cent reduction for the whole system as it has been found necessary to make in Minnesota (which after deducting as here for the Minnesota & International and the Big Forks & International Falls lines was substantially seven per cent), the valuation amounts to $452,666,489, and upon the testimony produced the cost of reproduction is found to amount to this sum."

Note.

Northern Pacific Case.

Evidence for Complainants.

William L. Darling, Chief Engineer—
2 N. P. 5-121.

Complainant's Exhibit 2, Darling, (10 N. P.).
Complainant's Exhibit 3, Darling, (10 N. P.).
Complainant's Exhibit 4, Darling, (10 N. P.).
Complainant's Exhibit 5, Darling, (10 N. P.).
Complainant's Exhibit 6, Darling, (10 N. P.).
Complainant's Exhibit 7, Darling, (10 N. P.).
Complainant's Exhibit 81, Darling, (10 N. P.).
Complainant's Exhibit 82, Darling, (10 N. P.).
Complainant's Exhibit 83, Darling, (10 N. P.).
Complainant's Exhibit 84, Darling, (10 N P.).
Complainant's Exhibit 85, Darling, (10 N. P.).
Complainant's Exhibit 86, Darling, (10 N P.).

Thomas Cooper—

System Land Values, 2 N. P. 256-258.
Complainant's Exhibit 9, Cooper, (10 N. P.).
Complainant's Exhibit 10, Cooper, (10 N. P.).

Howard Elliott— 4 N. P. 1219-1257.
4 N. P. 1274-1279.

"In the Great Northern case, there was testimony to the effect that the cost of reproduction for the entire system would amount to $549,253,317. Deducting for its interest in the Spokane, Portland & Seattle line $21,827,521 and for lines under construction $8,219,-581 leaves a balance of $519,206,215.

Assuming, as in the Northern Pacific case, that there should be the same per cent of reduction for the whole system as it has been necessary to make in Minnesota, and which is substantially 12 per cent, the valuation amounts to the sum of $457,121,469, and upon the testimony before the Master the cost of reproduction of the whole system is found to amount to this sum."

Note.

Great Northern Case.

Evidence for Complainants.

A. H. Hogeland— 2 G. N. 59.
Complainant's Exhibit 2, Hogeland, (6 G. N.).
Complainant's Exhibit 3, Hogeland, (6 G. N.).
Complainant's Exhibit 4, Hogeland, (6 G. N.).
Complainant's Exhibit 6, Hogeland, (6 G. N.).
Complainant's Exhibit 7, Hogeland, (6 G. N.).
Complainant's Exhibit 8, Hogeland, (6 G. N.).
Complainant's Exhibit 9, Hayden, (6 G. N.).
Complainant's Exhibit 10, Hayden, (6 G. N.).

Charles Hayden— 2 G. N. 173.

James J. Hill— 3 G. N. 1232:1254:
3 G. N. 1299:1303.

XIV.

"Division of Property Valuation Between Freight and Passenger Business, State and Interstate.

A common use in general is made of the property devoted to the public service for both the freight and passenger business, both state and interstate, respectively, and in making a statement with reference to each class so as to determine revenue with respect to cost, there must be a division of property valuation on some fair basis and an assignment to each of its proper proportion, so that each may carry its proper share of property expense.

It is inequitable that the traveling public, largely on pleasure bent, should cast any part of the expense it incurs on the freight business which has to do almost altogether with traffic in which the public as a whole is directly interested.

On the other hand, it has never been claimed that the latter should be relieved at the expense of the former, and the cases all recognize the propriety of separation upon an equable basis as near as may be.

Furthermore, to determine what net revenue is derived from intrastate business and the per cent of return upon property used in that class of business, it becomes necessary to make a subdivision of property values and determine what part thereof should be assigned to state and to interstate business, respectively. The revenues from each class of business within and properly assignable to the state are known and the amount thereof and the separation as between states accepted by both parties and are practically free from estimated approximations.

Of course, any division of property value between the two classes of business, freight and passenger, must be an approximation, but one made on the relation of gross revenue derived from each kind of business has been uniformly accepted as the fairest, all things considered, in all rate cases heretofore judicially determined. While a division of property valuation on the relation of cost has been suggested by defendants, it was practically conceded to be as open to criticism as that made on the basis of revenue. Relative cost as hereafter found is at best a rough and unsatisfactory approximation, necessarily inaccurate, and should not be accepted as a divisional basis if it can be avoided. The revenue basis is not ideal, but it has an element of certainty possessed by no other and is not more objectionable in other respects.

There is no controversy between the parties in the Northern Pacific and the Minneapolis & St. Louis

cases as to the total revenue and the part thereof assignable to state and interstate business respectively. In the Great Northern case there is some difference in this respect between the parties, but if the claim of defendants was allowed, it would not in any manner alter the judgment herein recommended to be entered.

A division of total value between freight business and passenger business, state and interstate, on the gross earnings basis in each of the three cases may be stated as follows:

Northern Pacific Case.

Division of Total Value Between Freight Business and Passenger Business on Gross Earnings Basis.

The total value of the property of the Northern Pacific Company, used in the fiscal year ending June 30, 1908, in the conduct of its transportation business in Minnesota, was $90,204,545."

Note.

Master's Report— Vol. 1 N. P. pp. 235-6.

"Such total value may justly and fairly be apportioned between freight business and passenger business on the basis of gross earnings,—that is, assign to each such percentage of total value as the amount of the gross earnings of each bears to the total gross earnings of both.

Total gross earnings from freight business and passenger business, including miscellaneous earnings of each, was in said year $13,336,046.87."

Note.

Master's Report— Vol. 1 N. P. 248.

Master's Report— Vol. 1 N. P., Table of Results, opposite p. 264.

Testimony Howard Elliott— 7 N. P. 3122.

Complainant's Exhibit 80, Elliott, (10 N. P.).

"Gross earnings freight business, including miscellaneous (consisting of switching, demurrage, storage, etc.) $9,823,508.35 equals *73.661 per cent of total.*

Gross earnings passenger business, including miscellaneous (consisting of mail, express, excess baggage, etc.) $3,512,538.52 equals *26.339 per cent of total.*

73.661 per cent of total value ($90,204,545) assigns $66,445,570 to the freight business, and 26.339 per cent of total value assigns $23,758,975 to the passenger business.

Division of Value Apportioned to Freight Business, Between Intrastate Business and Interstate Business on Gross Earnings Basis.

The total freight earnings, including miscellaneous, in Minnesota for the fiscal year ending June 30, 1908, amounted to $9,823,508.35, of which $1,606,771.26, or 16.356 per cent thereof, was intrastate, and $8,216,737.09, or 83.644 per cent, was interstate.

16.356 per cent of total value apportioned to freight business ($66,445,570) assigns $10,867,837 to the intrastate freight business, and 83.644 per cent of such total value apportioned to the freight business assigns $55,577,733 to the interstate freight business.

Division of Value Apportioned to Passenger Business Between Intrastate Business and Interstate Business.

The total gross passenger earnings, including miscellaneous, in Minnesota for the fiscal year ending June 30, 1908, amounted to $3,512,538.52, of which $1,206,333.09, or 34.344 per cent thereof, was intrastate and $2,306,205.43, or 65.656 per cent thereof, was interstate.

34.344 per cent of the total value apportioned to the passenger business ($23,758,975) assigns $8,159,782 to the intrastate passenger business, and 65.656 per cent of such total amount apportioned to the passenger business assigns $15,599,193 to the interstate passenger business.

Summary of Apportionment of Total Value to the Different Classes of Business in Minnesota.

Total value of property used in transportation business in Minnesota, for the fiscal year ending June 30, 1908.	$90,204,545	
Total value apportioned to freight business, 73.661 per cent, or	$66,445,570	
Total value apportioned to passenger business, 26.339 per cent, or	23,758,975	
Total		$90,204,545
(Equals 100 per cent.)		

Assign to intrastate freight business 16.356 per cent of total value apportioned to freight business.....	$10,867,837
Assign to interstate freight business 83.644 per cent of total value apportioned to freight business.....	55,577,733
Assign to intrastate passenger business in Minnesota 34.344 per cent of the total value assigned to passenger business	8,159,782
Assign to interstate passenger business in Minnesota 65.656 per cent of total value assigned to passenger business in Minnesota.....	15,599,193
Total	$90,204,545"

Note.

Complainant's Exhibit 80, Elliott, (10 N. P.).
Complainant's Exhibit 80-B, Elliott, (10 N. P.).
Abstract of Annual Report of Northern Pacific Railway Company to State of Minnesota for year ended June 30, 1908, p. 45, Operating Revenues, State of Minnesota. (Attached to Vol. 1 N. P.)
Table of Results—Northern Pacific Case—Master's Report opposite p. 264, Vol. 1 N. P.

"Great Northern Case.

Division of Total Value Between Freight Business and Passenger Business on Gross Earnings Basis.

The total value of the property of the Great Northern Company used in the fiscal year ending June 30, 1908, in the conduct of its transportation business in Minnesota, was $138,425,291."

Note.

Master's Report— Vol. 1 G. N., pp. 192-3.

"Such total value may be justly and fairly apportioned between freight and passenger business on the basis of gross earnings—that is, assign to each such percentage of total value as the amount of gross earnings of each bears to the total gross earnings of both.

Total gross earnings from freight business and passenger business, including miscellaneous earnings of each, was in said year.....$20,275,907.75"

Note.

Master's Report— Vol. 1 G. N. 205.

Master's Report— Vol. 1 G. N., Table of results opposite p. 226.

Testimony of Frank E. Ward— 3 G. N. 1080.

Complainant's Exhibit 53, Ward, (6 G. N.).

"Gross earnings, freight business, including miscellaneous (consisting of switching, demurrage, storage, etc.) $15,936,998.85
(Equals 78.6 per cent.)
Gross earnings passenger business, including miscellaneous (consisting of mail, express, excess baggage, etc.).....$ 4,338,908.90
Equals 21.4 per cent
(See Ex. 30, Parker, 49 Martin and 53 Ward.)

78.6 per cent of total value ($138,425,291) assigns $108,802,279 to the freight business, and 21.4 per cent of total value assigns $29,623,012 to the passenger business.

Division of Value Apportioned to Freight Business Between Intrastate Business and Interstate Business on Gross Earnings Basis.

The total freight earnings including miscellaneous in Minnesota for the year ending June 30, 1908, amounted to $15, 936,998.85, of which $2,408,421.43, or 15.112 per cent thereof, was intrastate, and $13,-528,577.42, or 84.888 per cent thereof, was interstate.

15.112 per cent of total value apportioned to freight business ($108,802,279) assigns $16,442,200 to the intrastate freight business, and 84.888 per cent of such total value apportioned to the freight business assigns $92,360,079 to the interstate freight business.

Division of Value Apportioned to Passenger Business Between Intrastate Business and Interstate Business.

The total gross passenger earnings, including miscellaneous in Minnesota for the year ending June 30, 1908, amounted to $4,338,908.90, of which $2,086,-276.68, or 48.083 per cent thereof, was intrastate, and $2,252,632.22, or 51.917 per cent thereof, was interstate.

48.083 per cent of the total value apportioned to the passenger business ($29,623,012) assigns $14,243,-

633 to the intrastate passenger business, and 51.917 per cent of such total amount apportioned to the passenger business assigns $15,379,379 to the interstate passenger business.

Summary of Apportionment of Total Value to the Different Classes of Business.

Total value of property used in transportation business in Minnesota for the fiscal year ending June 30, 1908	$138,425,291
Total value apportioned to freight business, 78.6 per cent or	108,802,279
Total value apportioned to passenger business, 21.4 per cent or	29,623,012
Total, 100 per cent	$138,425,291
Assign to intrastate freight business 15.112 per cent of total value apportioned to freight business	$16,442,200
Assign to interstate freight business 84.888 per cent of total value apportioned to freight business	92,360,079
Assign to intrastate passenger business in Minnesota 48.083 per cent of the total value assigned to passenger business	14,243,633
Assign to interstate passenger business in Minnesota 51.917 per cent of total value assigned to passenger business in Minnesota	15,379,379
	$138,425,291"

Note.

Complainant's Exhibit 30, Parker, (6 G. N.).

F. H. Parker— 2 G. N. 652.
Complainant's Exhibit 49, Martin, (6 G. N.).

George R. Martin— 3 G. N. 987.
Complainant's Exhibit 53, Ward, (6 G. N.).

Frank E. Ward— 3 G. N. 1080.
Abstract of Annual Report of Great Northern Railway Company to State of Minnesota for year ended June 30, 1908, p. 45, Operating Revenues, State of Minnesota. (Attached to Vol. 1 G. N.)
Table of Results—Great Northern Case—Master's Report opposite p. 226, Vol. 1 G. N.

"Minneapolis & St. Louis Case.

For this case see infra XVII, p. 127, (219 of this Annotated Report) where it is considered separately.

XV.

"Reasonable Return.

"Having made the foregoing distribution of property valuations, the question is, what return are the companies respectively entitled to receive thereon without legislative interference for the protection of the public?

It has been found that a full and fair return, such as is derived from investments in like kinds of business and subject to like conditions, would not compel the public served to pay an unjust or burdensome rate. It follows, therefore, that such valuation is as much an

element of rate-making and is entitled to the same consideration as are the operating expenses of the company. The theory that it is entitled to some return, the amount thereof to be adjusted by the legislature regardless of property values devoted to the public service, must be rejected. Any rate which will not produce a full and fair return is unreasonable, and is confiscatory to the extent that it comes short of producing such return, and is a taking of property from the carrier class and giving it to the persons served without compensation.

What is just return? One of the most fair-minded and intelligent witnesses before the Master; one who from his long official experience and efficient service had necessarily given the matter very careful consideration, was of the opinion that the carrier should be assured an average annual return of seven per cent on a fair valuation of its property."

Note.

Testimony of Charles F. Staples, member of Railroad & Warehouse Commission of Minnesota— 6 N. P. 2848-2863.

"The Master concurs in this view. Having in mind the nature of the business, its fluctuations from year to year due to extremes of weather and varying crop conditions, the fact that operations can never be suspended, but in time of adversity as well as of prosperity the carrier must be ready to serve or forfeit its property devoted to the public service, and that competition is ever present and increasing, it would seem

that the return here suggested would be the minimum when compared with returns from other kinds of business not subject to such conditions. It must be remembered also that the public demands and is able and willing to pay for a service of the highest efficiency, requiring able and skillful management. The continued prosperity of the country depends upon it, and the returns from such undertakings should be sufficiently adequate to encourage the investment of ample capital for their successful prosecution.

In *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, the question as to the reasonableness of the rates prescribed by the state of New York for the defendant company within the city of New York was before the Court for its determination. After making some general observations as to what compensation public service corporations would, under varying conditions, be entitled to receive, the Court uses the following language:

> 'In an investment in a gas company, such as complainant's, the risk is reduced almost to a minimum. It is a corporation, which in fact, as the court below remarks, monopolizes the gas service of the largest city in America, and is secure against competition under the circumstances in which it is placed, because it is a proposition almost unthinkable that the city of New York would, for purposes of making competition, permit the streets of the city to be again torn up in order to allow the mains of another company to be laid all through them to supply gas which the present company can adequately supply. And, so far as it is given us to look into the future, it seems as certain as anything of such a nature can be, that the demand for gas will increase, and, at the reduced price, increase

to a considerable extent. An interest in such a business is as near a safe and secure investment as can be imagined with regard to any private manufacturing business, although it is recognized at the same time that there is a possible element of risk, even in such a business. The court below regarded it as the most favorably situated gas business in America, and added that all gas business is inherently subject to many of the vicissitudes of manufacturing. Under the circumstances, the court held that a rate which would permit a return of six per cent would be enough to avoid the charge of confiscation, and for the reason that a return of such an amount was the return ordinarily sought and obtained on investments of that degree of safety in the city of New York.

'Taking all facts into consideration, we concur with the court below on this question, and think complainant is entitled to six per cent on the fair value of its property devoted to the public use.'

If a gas company under the conditions there disclosed, with an assured revenue beyond all reasonable probability of hazard, was entitled to six per cent net return on the value of its property devoted to the public use, a finding that in these cases the companies are entitled to seven per cent net return on such valuation after allowing for all necessary repairs and replacements is certainly conservative and does no injustice to the public. Few businesses are so free from hazard as that of national banks, and the evidence discloses that the average results of their business for thirty-eight years ending with 1907 show net annual earnings to capital and surplus of 8.58 per cent, and for the period from March 1, 1897, to June 30, 1907, of 9.84 per cent.

The Master determines that under the conditions disclosed in these cases the companies are entitled to a net return of seven per cent upon the value of their property as herein found.

XVI.

Net Revenue Derived from Freight and Passenger Business, Respectively.

It now becomes necessary to determine the net revenue derived from the passenger and freight business, respectively, within the state of Minnesota, and to do so we must ascertain the cost in each class. It has been hereinbefore determined what the gross revenue derived from each class of business and apportioned to the state is, and there is no substantial controversy as to the gross aggregate cost incurred in conducting both classes of business taken as a whole, nor as to the apportionment thereof to the state."

Note.

C. W. Hillman— 7 N. P. 3275:3279.
Complainant's Exhibit 79, Elliott, (10 N. P.).
Complainant's Exhibit 80, Elliott, (10 N. P.).

Howard Elliott— 7 N. P. 3122.
Defendant's Exhibit 3-M, Hillman, (9 N. P.).

C. W. Hillman— 3 G. N. 1477.
Complainant's Exhibit 47, Martin, (6 G. N.).
Complainant's Exhibit 53, Ward, (6 G. N.).

George R. Martin— 3 G. N. 955.
Defendant's Exhibit G, Hillman, (5 G. N.).

C. W. Hillman— 3 M. & St. L. 1119.
Complainant's Exhibit 33, Scott-D, (6 M. & St. L.).
Defendant's Exhibit "L," Hillman, Table 4, (5 M .& St. L.).

"Because of the fact that there is a common use of the property in conducting each class of business, it is impossible to apportion to each with any degree of accuracy its proper proportion of cost so that neither shall be unduly burdened, and as to this matter the parties are far apart, both as to results and as to methods in obtaining them, in both the Northern Pacific and Great Northern cases.

In the two cases last above mentioned, the allocations of cost made by the companies respectively have been acepted by both parties. That is to say, each company has assigned to the passenger business all those items of cost directly incurred in conducting that class of business and not common to both classes, and has assigned to the freight business all those items of cost directly incurred in conducting that class of business and not common to both classes, which assignments are accepted by both parties, and the items thereof are called allocated items and cover about sixty per cent of all expenses."

Note.

Complainant's Exhibit 79, Elliott, (10 N. P.).
Howard Elliott— 7 N. P. 3122.

C. W. Hillman— 7 N. P. 3288:3290:3293:
Defendant's Exhibit 3-M, Hillman, (9 N. P.).
Complainant's Exhibit 47, Martin, (6 G. N.).
Complainant's Exhibit 53, Ward, (6 G. N.).

C. W. Hillman— 3 G. N. 1504.
Defendant's Exhibit "G," Table 4, Hillman, (5 G. N.).

"The remaining items of cost not so allocated and which are common to and are incurred in conducting both freight and passenger business, are not capable of separation and assignment to each class except upon some more or less arbitrary basis, and approximations only are attainable. Such items by both companies have, in general, been divided and assigned to passenger and to freight business, respectively, upon the relation, as to most of them, which the revenue train-miles in the one class of business bears to the revenue train-miles in the other class of business, and to the items not so divided, upon the relation which the revenue engine-miles in the one class bears to the revenue engine-miles in the other, and this division and assignment has been accepted by the complainants and they have offered much testimony in support thereof in these two cases.

The division so made of such common items of cost between freight and passenger for the year ending June 30, 1908, in the Northern Pacific case is found in Ex. 79—Elliott, and the method pursued is fully explained by the assistant comptroller, Johnson, in his testimony found in Vol. 6, at pages 3249, et seq., of the printed Record in that case."

Note.

W. G. Johnson, Comptroller—
7 N. P. 3248-3252.
Howard Elliott— 7 N. P. 3122.
Complainant's Exhibit 79, Elliott, (10 N. P.).

"A like division in the Great Northern case is found in Ex. 47—Martin, with explanations by the assistant comptroller, Martin, of the method pursued, in Vol. 2, at page 955 of the printed Record in that case. The method is the same in both cases and is the one now, and which for many years last past has been, in general use upon all the leading railroads of the country when any attempt at such division is made, constituting, in mileage at least, about one-third of all the lines of railway in the United States. A division of this character was at one time required by the Interstate Commerce Commission, and the foregoing method was the one prescribed for the purpose. Such requirement was subsequently withdrawn and such division of cost between freight and passenger seems to have been quite generally abandoned, but many companies, for their own use and information, continue to make such division according to this method, which would seem to have been the outgrowth of practical observation and experience in the exercise of an honest judgment. When it was originally adopted, there was no apparent reason, from interest or otherwise, for unduly burdening either class of business with more than its proper share of common expense. Its use is approved and supported by the evidence of a number of witnesses having an intimate knowledge and large experi-

ence in the practical operation of railway transportation in all its details."

Note.

George R. Martin— 3 G. N. 955-984.
3 G. N. 985-987.
Complainant's Exhibit 47, Martin, (6 G. N.).

C. W. Hillman— 7 N. P. 3472:3723

W. G. Johnson— 8 N. P. 4217-4220.

"The method of division presented by the evidence on behalf of defendants is one devised by their accountant, Mr. C. W. Hillman, and may be styled the Hillman method."

Note.

C. W. Hillman— 7 N. P. 3456:3458.

"There in no difference between the parties in the division of train movement items, being items from 10 to 27 in the schedule of items used by them."

Note.

C. W. Hillman— 7 N. P. 3303.
Defendant's Exhibit 3-M, Hillman, (9 N. P.).
Complainant's Exhibit 79, Elliott, (10 N. P.).

C. W. Hillman— 3 G. N. 1476.
Defendant's Exhibit G-4, Hillman, (5 G. N.).
Complainant's Exhibit 47, Martin, (6 G. N.).

"The difference arises with respect to the rest of the items contained in such schedule, and they are for the most part divided by Mr. Hillman, item by item, in accordance with his individual judgment and opinion as to the propriety of such division."

Note.

C. W. Hillman, Cross-Examination—
7 N. P. 3450:3458-3464:3487-3494:3495-3497:3498-3553:
8 N. P. 3582-4107:4154-4170.

"No other witness was called in support of his method of division, nor does it appear that his experience was such in the practical operation of a railway as to specially qualify him for the work. He is certainly an able accountant and statistician, but could not be classed as a practical operating man."

Note.

C. W. Hillman— 7 N. P. 3269.
8 N. P. 3705-4107.

"It seems to the Master that the weight of evidence fails to sustain his method. In the Northern Pacific

case, for the fiscal year ending June 30, 1907, it results in taking something over $400,000 from the passenger and adding it to the freight expense, and in the Great Northern case, for the fiscal year ending June 30, 1908, it in like manner affects the relation of passenger to freight expense in the sum of $933,694."

Note.

Defendant's Exhibit 3-M, Hillman, Table 4.
Defendant's Exhibit G-Hillman, Table 4.

"Manifestly no one else, proceeding along the same lines that Hillman did but exercising his own individual judgment as to what, with respect to each item, was a proper division, would have reached the same results obtained by Hillman,, except as a mere coincidence. It was conceded that the method could be made to produce any result desired by the person making use of it unless every step taken by its author, varying from time to time according to conditions, were strictly followed."

Note.

C. W. Hillman— 7 N. P. 3494-3553.
8 N. P. 3722:3795:3662:3705-4107.

"If the views of the Master as to what is a reasonable rate of return, and his valuations, are accepted and

approved, the Hillman method, both as to division of freight and passenger, and his methods of determining the per cent of return on state business, would not, if adopted, change the decree to be entered, either in form or substance. It would, however, make a wide spread between the per cent of return from each class of business, so wide as to itself suggest that the division made by him was an improper one, greatly favoring, as it does, the net revenue from passenger business. The Master determines that the method of division of common cost between the freight and passenger business made by the Northern Pacific Company and the Great Northern Company with respect to the traffic on their respective roads most nearly approximates an accurate result, and the same is adopted for the purpose of division in the Northern Pacific and Great Northern cases.

In the Minneapolis & St. Louis case a division of cost between freight and passenger business was made by the company upon a combination of train, car and engine-mileage, with results so close to those produced by the Hillman method that they were accepted by the defendants.

The results of divisions of cost between freight and passenger and resulting net revenue in this case will appear later in this report."

Note.

C. W. Hillman— 4 M. & St. L. 1121-1124.

XVII.

"Net Return From Intrastate Passenger and Freight Business on Property Valuations Assigned to Each Respectively.

Northern Pacific Case.

Great Northern Case.

In the two cases mentioned in the caption of this subdivision we now have the following definitely ascertained elements for determining net return in the two classes of business, viz.:

1st. Gross revenue from state and interstate business, both freight and passenger, respectively, separately stated;

2nd. Relation of revenue per ton per mile and per passenger per mile, respectively, state to interstate;

3rd. Gross cost of operation, covering and being an aggregation of cost of state and interstate business, freight and passenger;

4th. The division of cost between the freight and passenger business as herein found and determined.

The element not certainly known and which must be ascertained and determined from the evidence is the relation of cost, state to interstate, in each class of business, freight and passenger. This found as to passenger-miles and ton-miles respectively, and the problem of determining the net revenue from each class can be readily solved.

It is needless here to recount the difficulties this problem presents, growing out of the common use of the same property in contemporaneously conducting both state and interstate transportation. They have been often recited with much particularity in railway rate decisions and are again fully described

by experienced railway officials and employes called as witnesses in these cases, and their testimony more than justifies a suggestion made by Judge Van Devanter in response to some inquiry of counsel when orally delivering his opinion in *St. Louis & C. R. Co. v. Allen,* in the course of which he made use of the following language, viz.:

> "Taking as your premise that the authority of Congress is supreme and therefore in respect of interstate commerce its authority shall be everywhere equally dominant, I am not sure but that the result would be in some instances where there is such a confusion, such an interweaving, as that there could not be a separation, that there the power of Congress would be the dominant power and that the other power would not exist; not on the theory that Congress has any authority over state rates, but that since its authority over interstate commerce must reach in every part and parcel of it, Congress must say that anything that gets interwoven with it must partake of the exercise of that authority. Otherwise the power of Congress, which is supreme, would not be supreme."

It is conceded by all that there is practically no difference in cost arising from the fact that a transportation is across a state line and not wholly within the state, and there is no dispute but that a substantial difference exists in the cost of doing the short-haul and the long-haul business. This is clearly evidenced, in the freight business, by all rate tariffs, including the schedules of rates prescribed by the Commission's orders and the Commodity Rate Act which gave rise to these suits. The orders covering merchandise rates make the hauling charge for the first

two hundred miles twice as large as for the second two hundred miles, and four times as large as for distances beyond the four-hundred-mile point, and a similar relation exists in the legislative commodity rates. There is, of course, some state traffic having a reasonably long haul and some interstate traffic having a short haul, but by far the greater volume of state business belongs to the more expensive short-haul class, and in the interstate business by far the greater part thereof belongs to the less expensive long-haul class. This is established by the fact that in the Northern Pacific case, for the year ending June 30, 1908, as the evidence shows, there were 960,709,494 ton-miles of interstate traffic touching Minnesota, with an average haul of 485.3 miles as against 130,580,988 ton miles of state traffic with an average haul of only 104.52 miles. (Ex. 80—Elliott.)

In the Great Northern case, for the year ending June 30, 1908, the evidence shows 1,952,426,967 ton-miles of interstate traffic touching Minnesota, with an average haul of 411.8 miles as against 171,317,766 ton-miles of state traffic with an average haul of only 113.3 miles. (Ex. 53—Ward.) State traffic is always burdened with the expense of two terminals within the state, whereas interstate traffic very generally is charged with the expense of but one terminal, and as to overhead or trans-state shipments in carload lots, as is a very considerable part of the business, no such expense is incurred beyond the comparatively small yard expense in the making up and handling of through trains.

Doubtless the most marked difference in transportation cost depends upon whether the freight handled

is through or local with respect to the several operating divisions of the line. That is, freight hauled over less than one division on local or peddling trains, as they are called, is known as local freight, and freight hauled over one or more divisions on through trains is known as through freight on such divisions, and this without reference to whether it is state or interstate traffic. A divisional distance consists, in general, of from about 110 to 150 miles, the same constituting an engine-run. There is, of course, some intrastate traffic which moves on through trains, but the greater part thereof is local freight. There is also a considerable amount of interstate traffic which moves on local trains, but by far the greater part thereof is through freight, as is shown by the long average haul. It is also true that local trains often carry through freight and through trains carry local freight in order to secure the most efficient and economical operation.

In view of these and all other conditions attending transportation, as disclosed by the evidence, entering into the question of relative expense, it becomes a difficult matter to determine with any degree of certainty the relation of cost per ton per mile in transporting state and interstate freight respectively, the expense of which is practically all common to both and not subject to allocation. The complainants have produced as witnesses before the Master a very considerable number of able and competent operating men, intimately acquainted with and having a wide knowledge of all the details of railway transportation derived from long personal experience in conducting such business. Their testimony is to the effect that it

costs from three to seven times as much per ton per mile to do the intrastate freight business as to do the interstate freight business, and that it costs from twenty-five to fifty per cent per passenger per mile more to do the state passenger business than to do the interstate passenger business."

Note.

James J. Hill—	3 G. N. 1304-1318.
Howard Elliott—	7 N. P. 3123, et seq.
Frank E. Ward—	3 G. N. 1078:1082: 3 G. N. 1094-1133.
William B. Doddridge—	3 G. N. 1143-1171.
Chester J. McPherson—	3 G. N. 1172-1231.
J. N. Tittemore—	3 M. & St. L. 779; 968-982: 3 M. & St. L. 1026.

"The defendants concede that there is greater cost attending the doing of state business, both passenger and freight, but insist that this increased cost is largely, if not wholly, taken up by the increased revenue per ton and per passenger per mile derived from the state traffic. Their chief reliance is upon the evidence of their expert accountant Mr. Hillman, before mentioned, by the use of whose method, similar in many respects to that devised by him for dividing common items of cost between freight and passenger, in connection with his testimony in support of such method they have endeavored to establish their claim. The tables presented by him as a basis of his testi-

mony are for most items of cost the result of his own personal judgment and opinion, and as to some of them upon which his results are predicated there have been certain material assumptions not justified by the conditions found to exist. Here, too, it is conceded that any material difference of opinion as to division —as there would most likely be with regard to some, if not many, of the items—would effect very substantially different results."

Note.

C. W. Hillman— 7 N. P. 3524-3553:
8 N. P. 3582:3600-3605:3645:3650-3659:3662-3665:3702-3705:3719-3723:3795:3876:3903-4177.

Defendant's Exhibit 3-L, Hillman, (9 N. P.).
Defendant's Exhibit 3-M, Hillman, Table 5, (9 N. P.).
Defendant's Exhibit 3-M, Hillman, Table 6, (9 N. P.).
Defendant's Exhibit 3-M, Hillman, Table 7-15, (9 N. P.).
Defendant's Exhibit G, Hillman, Table 1-13, (5 G. N.)
Defendant's Exhibit H, I and J Hillman, (5 G. N.).
3 G. N. 1476-1556.
4 M. & St. L. 1118-1165.
Defendant's Exhibit L, Hillman, Tables 1-14, (5 M. & St. L.).
Defendant's Exhibit M, Hillman, (5 M. &. St. L.).

"Another matter tending to discredit the Hillman method is the wide spread in operating per cent between state and interstate business of some of the companies and the low operating per cent as to state business on some lines as compared with that on others and as compared with the operating per cent generally found to exist on all lines of all business done in the country. Operating per cent is the per cent of gross revenue absorbed by cost of operation, and if we may take the statement of counsel in one of the briefs for defendants, (and it would seem to be a matter as to which the Court might take judicial notice) such operating expense is about 60 per cent of gross revenue generally throughout the country. By the Hillman method percentages of operating expense to revenue after deducting estimated losses from the prescribed rates in the three cases are found to be as follows:

Intrastate passenger, N. P. 58.89; G. N. 67; M. & St. L. 62.54.

Interstate passenger, N. P. 51.69; G. N. 59.2; M. & St. L. 63.67.

Intrastate freight, N. P. 55.21; G. N. 41.51; M. & St. L. 48.19.

Interstate freight, N. P. 54.47; G. N. 60.58; M. & St. L. 85.03.

In the St. Louis case, in the intrastate business, without deducting for estimated loss, the operating expense would have been only 41.9 per cent of intrastate revenue, and in the Great Northern case such operating expense would have been only 39.9 per cent of intrastate revenue. There seems to be no substantial reason for the difference here found to exist on

the Northern Pacific when compared with the Great Northern line, and the marked and necessarily conceded difference in density of traffic over these lines and that over the Minneapolis & St. Louis line, the former greatly exceeding the latter, would be expected to produce very different results than those shown by this table of comparisons. The wide disparities and unusual results from comparisons are not adequately explained, and they strongly suggest an improper method of division between the two classes of business.

The Master finds from the weight of testimony that the cost per ton-mile of doing state freight business is at least two and one-half times as much as is such cost in doing the interstate freight business in Minnesota, and that the testimony would amply sustain, if it does not compel, a finding that such relation of cost is as three to one. He also finds from the evidence that the cost per passenger-mile in the state passenger business is at least fifteen per cent greater than such cost in the interstate passenger business in Minnesota.

As a result of the foregoing findings of fact we are now in possession of all the elements for a finding of net revenue derived from the doing of intrastate freight business and intrastate passenger business, respectively, and they may be stated as follows for each of the three cases:

Northern Pacific Case.

Net Revenue Derived from Freight Business and Passenger Business Respectively.

Gross Earnings.

The total gross earnings of the Company from all sources, involving any use of the property above valued, within the state of Minnesota for the fiscal year ending June 30, 1908, was $13,682,983.27. (Complainants' Exhibit 80 B—Elliott, treating rentals as a "net" item of $259,196.65).

The above total amount is made up as follows:	
Freight revenue (transportation)...	$9,509,077.33
Miscellaneous freight earnings derived from switching, demurrage, storage, etc.....	314,431.02
Total freight earnings, including miscellaneous	$9,823,508.35
Total passenger revenue (transportation of persons).....	$2,955,868.51
Miscellaneous passenger earnings (consisting of mail, express, etc.)...	556,670.01
Total passenger earnings.....	$3,512,538.52
Total freight and passenger earnings..	$13,336,046.87

Division of Freight Earnings Between Intrastate and Interstate.

Total freight revenue, transportation:		
Intrastate	$1,555,342.92	= 16.356%
Interstate	7,953,734.41	= 83.644%

Miscellaneous freight earnings divided on basis of transportation revenue.

Intrastate	$51,428.34 = 16.356%
Interstate	263,002.68 = 83.644%

Total freight earnings:

Intrastate	$1,606,771.26 = 16.356%
Interstate	8,216,737.09 = 83.644%
Total	$9,823,508.35 = 100%

Division Passenger Earnings Between Intrastate and Interstate.

Passenger revenue:

Intrastate	$1,015,150.34 = 34.344%
Interstate	1,940,718.17 = 65.656%

Miscellaneous passenger earnings divided on basis of transportation revenue:

Intrastate	$191,182.75 = 34.344%
Interstate	365,487.26 = 65.656%

Total passenger earnings:

Intrastate	$1,206,333.09 = 34.344%
Interstate	2,306,205.43 = 65.656%
Total	$3,512,538.52 = 100%

In addition to the foregoing earnings there was derived from the use of property included in the foregoing valuation certain "miscellaneous income net items" from outside operations (sleeping, parlor and dining cars, etc.), rental received for use of tracks, yards and other property and hire of equipment, amounting in the aggregate to $346,936.40 plus $13,336,046.87 equals $13,682,983.27. (Ex. 80-B—Elliott.)

Operating Expenses.

Total operating expenses in Minnesota for said year (Exhibit 80-B—Elliott).	$7,655,350.20
Total taxes	596,118.51
Total (Exhibit 80-B—Elliott).	$8,251,468.71

Total net income derived from the use of Minnesota property, included in valuation,—gross earnings from all such sources, $13,682,983.27—less operating expenses and taxes $8,251,468.71, leaves $5,431,514.56 equals 6.021 per cent return of value.

Division of Operating Expenses Between Freight and Passenger.

Of the total operating expenses there was expended in the conduct of the freight business	$5,343,718.25
And in the conduct of the passenger business	2,311,631.95
Total (Exhibit 79—Elliott.)	$7,655,350.20

Division of Freight Operating Expenses Between Intrastate and Interstate.

The total freight operating expenses—$5,343,718.25 may be fairly and justly divided between the intrastate freight business and the interstate freight business, on either one of two bases:

1. The relation of the average intrastate ton mile cost to the average interstate ton mile cost—"Equated Ton Mile Basis"; and

2. The relation of cost required to produce a given amount of revenue in the intrastate business compared

with the cost required to produce the same amount of revenue in the interstate business—"Equated Revenue Basis."

As hereinbefore found, during the said year, ending June 30, 1908, it cost said Company at least 2½ times as much on the average to produce a ton mile in the intrastate business as in the interstate business.

During said year the relation of revenue per ton per mile derived from the intrastate business was as 1:4387 is to 1.0000, and on the same rates and under like conditions such relation will hereafter continue to be substantially the same."

Note.

Complainant's Exhibit 80, Elliott, Sub-Title "Traffic in State of Minnesota—Freights—All Divisions in Minnesota."

"To divide the total freight operating expenses on the Equated Ton Mile Basis—the relation of cost per ton per mile of intrastate business to the cost per ton per mile of the interstate business being as 2½ is to 1—multiply the actual number of intrastate ton miles by 2½ and the product will be the number of intrastate ton miles which would have been produced by the expenditure which was actually made in the conduct of the intrastate freight business, if the production of a ton mile in the intrastate business on the average had been attended by the same cost as the production of a ton mile in the interstate business on the average,—

then add such product to the actual number of interstate ton miles, and the sum will be the total number of ton miles, both intrastate and interstate which would have been produced by the expenditure which was actually made in the conduct of both classes of business if the production of a ton mile in the intrastate business on the average had been attended by the same cost as the production of a ton mile in the interstate business on the average,—this total may be called the "Equated Ton Miles." For the intrastate operating expenses take such percentage of the total freight operating expenses as the number of ton miles so increased —or equated—is of the total number of equated ton miles, and for the interstate operating expenses take such per cent of the total operating expenses as the interstate ton miles is of the total equated ton miles.

To divide such total freight operating expenses on the Equated Revenue Basis, the relation of cost per ton per mile of the intrastate business to the cost per ton per mile of the interstate business, being as 2½ is to 1, and the relation of revenue per ton per mile derived from the intrastate business to the revenue per ton per mile derived from the interstate business, being as 1.4387 is to 1.0000, first determine what—on such facts—is the relation of cost per ton per mile in the intrastate business in proportion to revenue, to the cost per ton per mile in the interstate business in proportion to revenue. This may be done by dividing such ton mile relation by such revenue relation, as follows:

$$\frac{250}{100} \div \frac{1.4387}{1.0000} = \frac{1.7377}{1.0000}$$

It, therefore, appears that the production of a given amount of revenue in the intrastate freight business is attended with greater cost than the production of the same amount of revenue in the interstate freight business, and that such excess of cost is and will be at least 73.77 per cent.

To divide total freight operating expenses on the "Equated Revenue Basis" in accordance with the facts in this case as above stated:

Increase the intrastate earnings by 73.77%, thereby showing what would have been earned by the same actual expenditure in the conduct of the intrastate business had it been attended with the same relative cost as the interstate business. Then add the intrastate earnings, as so increased—or equated—to the interstate earnings, thereby ascertaining what would have been earned by the actual expenditure in conducting both intrastate and interstate traffic had the former been attended with the same relative cost as the latter. Then ascertain what proportion of this total represents the intrastate earnings as so increased—or equated—and what proportion represents the interstate earnings, and then ascertain the corresponding proportions of the total cost of the intrastate and interstate freight traffic, and the same will be the cost of intrastate freight business and interstate freight business respectively. (See 163 Fed. 141.)

The equated ton mile basis on the relation of 2½ to 1 is in this case exactly the same as the equated revenue basis on the relation of 1.7377 to 1.0000.

Applying either of these rules to the facts above stated, the total freight operating expenses—$5,343,718.25—is divided as follows:

Intrastate .....$1,355,273.82 = 25.362%
Interstate ..... 3,988,444.43 = 74.638%

$5,343,718.25 = 100%"

See Table of Results in Northern Pacific Case, 1 N. P. opposite page 264.

"Division of Total Passenger Operating Expenses Between Intrastate Passenger and Interstate Passenger.

As hereinbefore stated, it is found that during said year it cost said Company to produce an intrastate passenger mile in said State 1.15 times as much as to produce an interstate passenger mile in said State.

The evidence shows that the average revenue per passenger mile in the intrastate business was $1.9404 (computed from 80 Elliott), and in the interstate business was 1.9228 (computed from 80 Elliott). The relation of such revenue, intrastate to interstate, is as 1.0092 to 1.0000. The relation of cost in proportion to revenue is:

$$\frac{115}{100} \div \frac{1.0092}{1.0000} = \frac{1.1395}{1.0000} \text{ or } 1.1395 \text{ to } 1.0000.$$

Such total passenger operating expenses may fairly and justly be divided between the intrastate business and the interstate business on the "Equated Passenger Mile Basis," or the "Equated Revenue Basis," in like manner as that hereinbefore stated for the division of the freight operating expenses between the intrastate freight business and interstate freight business on the two similar bases heretofore explained.

The "Equated Passenger Mile Basis," on relation of costs per passenger mile intrastate to interstate, 1.15 to 1, is exactly the same as the "Equated Revenue Basis" on the relation of 1.1395 to 1.0000.

Dividing the total passenger operating expenses, $2,311,631.95—100%—on either of such bases, there will be assigned to the intrastate passenger business $863,325.18=37.347%, and to the interstate passenger business $1,448,306.77=62.653%.

Apportionment of Taxes to Various Classes of Business.

The total taxes and assessments paid in Minnesota by said Company in said year amounted to $596,-118.51."

Complainant's Exhibit 80-B, Elliott, (10 N. P.).

"Such sum may be fairly and justly apportioned to the various classes of business on the gross earnings basis as follows:

Intrastate freight	$71,820.32
Interstate freight	367,286.53
Intrastate passenger	53,924.08
Interstate passenger	103,087.58
	$596,118.51

Apportionment of Other Income to Various Classes of Business on the Gross Earnings Basis.

During said year the Company received for "Rentals" and for "Hire of Equipment" over and above amounts paid on account thereof in Minnesota, $259,-196.65, which amount may justly and fairly be dis-

tributed between the various classes of business, on the gross earnings basis.

In addition to the last mentioned sum, there was received from "Outside Operations" (consisting of sleeping, dining, chair and parlor cars, etc.), $87,739.75, which may fairly and justly be divided between the intrastate passenger business and the interstate passenger business on the passenger earnings basis.

On account of the two items last mentioned there should be added to the earnings derived from each class of business the following sums:

Intrastate freight	$31,227.99
Interstate freight	159,698.85
Total	$190,926.84
Intrastate passenger	$53,579.92
Interstate passenger	102,429.64
Total	$156,009.56

(See Exhibit 80-B Elliott.)

Net Income Applicable to Return Upon Valuation of Property Apportioned to the Various Classes of Business.

If from such total receipts so assigned to each class of intrastate business as hereinbefore stated, there be deducted the sum of the operating expenses and taxes so assigned to each such class of intrastate business, we have the following results:

Intrastate net freight income $210,905.11 yields sufficient for an annual return on $10,867,837 of only 1.941%.

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Note.—The losses which would have resulted from the application of the commodity rates enjoined have not been deducted. From Exhibit 63—Johnson, it is estimated that the intrastate freight earnings in Minnesota would have been reduced in said year by the application of such rates $21,493.67, which would effect a reduction in the rate of return last mentioned.

Intrastate passenger income $342,663.75 sufficient to yield an annual return upon $8,159,782 of only 4.2%.

Total intrastate (freight and passenger) income, $553,568.86, sufficient to yield an annual return on $19,027,619 (total valuation assigned to all intrastate business) of only 2.909%.

The foregoing data, deductions and results are included or deducible from the table following:

Note 1.—In this statement the valuation of the property is divided upon the revenue basis between freight and passenger and inter and intra of each.

If it be considered that operating expenses more correctly measure the use of the property than earnings, the division would be as follows:

Intra Freight.

Dividing Valuation on Operating Expense Basis.

Intra freight operating expenses	$1,355,273.82 =	17.7%
All operating expenses....	7,655,350.20 =	100%
17.7% of $90,204,545 valuation = 16,166,204		
Intra income—freight....	210,905.11	
Annual return.....		1.304%

Intra Passenger.

Intra passenger operating expenses	$863,325.18 =	11.28%
All operating expenses....	7,655,350.20 =	100%
11.28% of $90,204,545 valuation = 10,175,073		
Intra income—passenger.	342,663.75	
Annual return.....		3.368%

The rate of return on interstate freight and passenger would be increased over that shown in the statement.

There were introduced in evidence various statements by defendants for the purpose of showing what they claimed the actual net Minnesota intrastate freight and Minnesota intrastate passenger incomes were in the business of the fiscal year ending June

30, 1907, but the same, when taken in connection with all the testimony, fail to show that the rates complained of were not confiscatory. The defendants offered no corresponding statements with respect to such business for the year ended June 30, 1908.

Great Northern Case.

Net Revenue Derived from Freight Business and Passenger Business Respectively.

Gross Earnings.

The total gross earnings of the Company from all sources, involving any use of the property above valued within the state of Minnesota, for the fiscal year ending June 30, 1908, was $20,831,317.57. (See Exhibit 30—Parker, 49—Martin, 53—Ward and reports to the State, fiscal year ending June 30, 1908.)

The above total amount is made up as follows:

Freight revenue transportation.....		$15,658,661.07
Miscellaneous freight earnings derived from switching, demurrage, storage, etc.		278,337.78
Total freight earnings including miscellaneous	$15,936,998.85	
Total passenger revenue (transportation of persons).....	3,640,627.45	
Miscellaneous passenger earnings (consisting of mail, express, etc.).	698,281.45	
Total passenger earnings.....	$ 4,338,908.90	
Total freight and passenger earnings		20,275,907.75

Division of Freight Earnings Between Intrastate and Interstate.

Total freight revenue transportation:
Intrastate ..... $ 2,366,359.02=15.112%
Interstate ..... 13,292,302.05=84.888%
Miscellaneous freight earnings divided on basis of transportation revenue:
Intrastate ..... $ 42,062.41=15.112%
Interstate ..... 236,275.37=84.888%
Total freight earnings:
Intrastate ..... $ 2,408,421.43=15.112%
Interstate ..... 13,528,577.42=84.888%

Total..... $15,936,998.85=100%

Division Passenger Earnings Between Intrastate and Interstate.

Passenger revenue:
Intrastate ..... $1,750,522.02=48.083%
Interstate ..... 1,890,105.43=51.917%
Miscellaneous passenger earnings divided on basis of transportation revenue:
Intrastate ..... $ 335,754.66=48.083%
Interstate ..... 362,526.79=51.917%
Total passenger earnings:
Intrastate ..... $2,086,276.68=48.083%
Interstate ..... 2,252,632.22=51.917%

In addition to the foregoing earnings there was derived from the use of the property included in the foregoing valuation certain miscellaneous income from outside operations (sleeping, parlor, dining cars, etc.), rentals received for use of tracks, yards and other property and hire of equipment amounting in the aggregate to $555,409.82+$20,275,907.75=$20,831,-317.57. (See exhibits and reports above cited.)

Operating Expenses.

Total operating expenses in Minnesota for said year (See Exhibit 47—Martin)	$11,811,414.35
Total taxes	839,878.11
Total	$12,651,292.46
Total net income derived from the use of property in Minnesota—gross earnings from all sources	$20,831,317.57
Less operating expenses and taxes	12,651,292.46
Leaves	$ 8,180,025.11

=5.909% on $138,425,291 total Minnesota valuation.

Division of Operating Expenses Between Freight and Passenger.

Of the total operating expenses there was expended in the conduct of the freight business	$ 8,141,355.61
And in the conduct of the passenger business	3,670,058.74
Total	$11,811,414.35

(See Exhibit 47—Martin.)

Division of Freight Operating Expenses Between Intrastate and Interstate.

The total freight operating expenses—$8,141,355.61—may be justly and fairly divided between the intrastate freight business and the interstate freight business on either of two bases:

1. The relation of the average intrastate ton mile cost to the average interstate ton mile cost—"Equated Ton Mile Basis," and

2. The relation of cost required to produce a given amount of revenue in the intrastate business compared with the cost required to produce the same amount of revenue in the interstate business—"Equated Revenue Basis."

As hereinbefore found, it did during said year, cost said Company at least 2½ times as much on an average to produce a ton mile in the intrastate business as in the interstate business.

During said year the relation of revenue per ton per mile derived from intrastate business to the revenue per ton mile derived from the interstate business was as 2.02894 is to 1.00000 (53—Ward); and on the same rates and under like conditions such relation will hereafter continue to be substantially the same.

The relation of cost per ton per mile in the intrastate business in proportion to revenue to the cost per ton per mile in the interstate business in proportion to revenue is

$$\frac{250}{100} \div \frac{2.02894}{1.00000}$$

or 1.23217 to 1.00000. That is to say, the production of a given amount of revenue in the intrastate freight business is attended with greater cost than the production of the same amount of revenue in the interstate freight business, and such excess of cost is and will be at least 23.217%.

The division of the total freight operating expenses on the Equated Ton Mile Basis or on the Equated Revenue Basis may be effected in the same manner

as that heretofore described in the Northern Pacific case.

The Equated Ton Mile Basis on the relation of 2½ to 1 is in this case exactly the same as the Equated Revenue Basis on the relation of 1.23217 to 1.

Applying either of the rules above referred to to the facts in this case as above stated, the total freight operating expenses, $8,141,355.61, is divided as follows:

Intrastate	$1,464,629.87=17.99%
Interstate	6,676,725.74=82.01%
	$8,141,355.61=100%

Division of Total Passenger Operating Expenses Between Intrastate Passenger and Interstate Passenger.

As hereinbefore stated it is found that during said year it cost said Company to produce an intrastate passenger mile, in said State, 1.15 times as much as to produce an interstate passenger mile in said State.

The evidence shows that the average revenue per passenger per mile in the intrastate business was 1.9016, and in the interstate business was 2.0469. (53 —Ward.)

The relation of such revenue intrastate to interstate is as 0.92901 is to 1.00000.

The relation of cost in proportion to revenue is

$$\frac{115}{100} \div \frac{0.92901}{1.00000} = \frac{1.2378}{1.00000} \text{ or } 1.2378 \text{ to } 1.$$

Such total passenger operating expenses may fairly and justly be divided between the intrastate business and the interstate business on the Equated Passenger Mile Basis, or the Equated Revenue Basis, in like manner as that hereinbefore stated in the Northern Pacific case for the division of the freight operating expenses between the intrastate freight business and the interstate freight business, on the two similar bases there explained.

The Equated Passenger Mile Basis on the relation of cost per passenger mile intrastate to interstate, 1.15 to 1. is exactly the same in this case as the Equated Revenue Basis on the relation of 1.2378 to 1.

Dividing the total passenger operating expenses—$3,670,058.74—100%—on either of such bases, there will be assigned to intrastate passenger business $1,-960.215.07=53.411%, and to the interstate passenger $1,709,843.67=46.589%.

Apportionment of Taxes to Various Classes of Business.

The total taxes and assessments paid in Minnesota by said Company in said year amounted to $839,-878.11."

Exhibit G, Hillman, Tables 11 and 12, 5 G. N. Annual Reports to State of Minnesota, 1908, Vol. 1 G. N.

"Such sum may be fairly and justly apportioned to the various classes of business on the gross earnings basis as follows:

Intrastate freight	$ 99,761.00
Interstate freight	560,383.19
Intrastate passenger	86,421.46
Interstate passenger	93,312.46
Total	$839,878.11

Apportionment of Other Income to Various Classes of Business on the Gross Earnings Basis.

During said year the Company received for rentals and for hire of equipment over and above amounts paid on account thereof in Minnesota $462,763.95, which amount may justly and fairly be distributed between the various classes of business on the gross earnings basis.

In addition to the said last mentioned sum there was received from outside operations(consisting of sleeping, dining, chair and parlor cars, etc.) $92,645.87, which may fairly and justly be divided between the intrastate passenger business and the interstate passenger business on the passenger earnings basis.

On account of the two items last mentioned there was added to the earnings derived from each class of business the following sums:

Intrastate freight	$ 54,976.35
Interstate freight	308,756.11
	$363,732.46
Intrastate passenger	$ 92,164.22
Interstate passenger	99,513.14
	$191,677.36

(See reports to the State for the year ending June 30, 1908.)

Net Income Applicable to Return Upon Valuation of Property Apportioned to the Various Classes of Business.

If from such total receipts so assigned to each class of intrastate business as hereinbefore stated there be deducted the sum of the operating expenses and taxes so assigned to each such class of intrastate business, we have the following results:

Intrastate freight, income, $898,997.81, sufficient to yield an annual return on $16,442,200 of only 5.468%.

Note.—The losses which would have resulted from the application of the commodity rates enjoined have not been deducted. The same are shown by Exhibit 22—Parker to be $87,261.43 (and by Exhibit G—Hillman, Table 11, $129,852.53). Deducting the amount shown by Complainants—$87,261.43—less 4% taxes—$3,490.46—leaves a net deduction $83,770.97, which subtracted from net intrastate freight income as above stated, $898,997.81, would leave $815,226.84, sufficient to yield an annual return on the value above stated (valuation not reapportioned on account of change in revenue) of 4.958%. And if the amount of such losses as estimated by the defendants be taken, the rate of return would be less than the figure last stated.

Intrastate passenger income $131,804.37 is sufficient to yield an annual return upon $14,243,633 of only 0.925%.

Total intrastate (freight and passenger) income (estimated commodity losses not deducted), $1,030,802.18 is sufficient to yield an annual return on $30,685,833 (total valuation assigned to all intrastate business) of only 3.359%.

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Deducting the commodity losses, less the taxes, as estimated by complainants as aforesaid, the total intrastate (freight and passenger) income would be sufficient to yield an annual return on total value assigned to all intrastate business of only 3.086%.

The foregoing data, deductions and results are included in or deducible from the table following:

Note 1.—In this statement valuation of the property is divided upon the revenue basis between Freight and Passenger, and inter and intra of each.

If it be considered that operating expenses more correctly measure the use of the property than earnings, the division would be as follows:

Intra Freight.

Intra Freight operating expenses	1,464,629.87=1.24%
All operating expenses	11,811,414.35=100 %
12.4% of $138,425,291 valuation =	17,164,738
Income—Intra Freight	898,997.81
Annual return	5.237%

Intra Passenger.

Intra Passenger operating expenses	$ 1,960,215.07=16.6%
All operating expenses	11,811,414.35=100 %
16.6% of $138,425,291 valuation =	22,978,596
Income—Intra Passenger	131,804.37
Annual return	0.574%

The rate of return on interstate freight and interstate passenger would be increased over that shown in the statement.

Note 2.—The intrastate freight loss which would have resulted by the application of Chapter 232 was estimated by Hillman's Exhibit G, Table 10 at $129,852.53. By Parker's Exhibit 22 it was estimated at $87,261.43. In the statement no deduction has been made from intrastate freight revenue on account of such loss.

The amount of intrastate *net* freight revenue shown by the statement is	$898,997.81
Subtracting loss shown by Exhibit 22—Parker	87,261.43
The new net intrastate revenue would be	$811,736.38

Divided by the proportion of value assigned to intrastate freight, to-wit, $16,442,200, the net annual return of 4.937% on intrastate freight will be the result instead of 5.468% as shown on the statement. (The computation producing the rate of return first above mentioned—4.937—does not take into account the reapportionment of value to intrastate freight resulting from the reduction of intra gross freight earnings. If such reapportionment were made the value of property so assigned would be somewhat decreased, and the rate of return somewhat increased over 4.937).

Note 3.—Hillman does not show the intrastate freight loss which did result from the application of the merchandise rates complained of. Parker by his Exhibit 22 did show the same to be $178,978.96. What would be the net annual return on value of property apportioned to intrastate freight if injunction continues against commodity rates, and old merchandise rates prior to orders of September 6, 1906, and May 3, 1907, be fully restored?

The statement shows net intrastate freight pays	$ 898,997.81
Add merchandise loss	178,978.96
And the new net intrastate freight income would be	$1,077,976.77

which divided by value assigned to intrastate freight—$16,442,200—(not reapportioned to correspond with increased intrastate earnings), less than 6.556% would be produced. *But* if valuation be reapportioned to correspond with increased intrastate gross earnings, $17,115,651.00, valuation would be assigned to intrastate freight earnings—$1,077,976.11—then 6.293% return on intrastate freight business would be shown on basis of old rates, merchandise and commodity.

Note 4.—The statement shows passenger intrastate net income applicable to valuation to be $131,804.37, and the rate of return to be less than 1%, to-wit, 0.925%. Tilton, by his Exhibit 37, shows a passenger intrastate loss of $470,673.17. If this be added to $131,804.37, a new net intra passenger income applicable to valuation of $602,477.54 would result. The value apportioned to intra passenger business in the statement on the basis of the gross earnings as they were was $14,243,633. If the passenger rates were restored to the 3 cent basis, and gross earnings thereby increased, an apportionment of value on basis of increased earnings would assign to intra passenger $16,914,224.00, which divided into the new net income—$602,477.54—would produce only 3.56% return on intra passenger business if the old rates were restored.

There were introduced in evidence various statements by defendants for the purpose of showing what they claim the actual net Minnesota intrastate freight and Minnesota intrastate passenger income were on the business of the fiscal year ending June 30, 1908, (see Exhibit G—Hillman).

The gross receipts of said Company from all sources in Minnesota used in the foregoing table exceeds the gross receipts charged against the Company in Minnesota by defendants' evidence (excluding income on investments), $146,528.27, of which more than $140,000 was on account of hire of equipment not taken into account by defendants in their tables. There is no dispute between the parties as to the total amount of operating expenses chargeable to the business of the Company done within the State."

Note.

Hillman— 3 G. N. 1477.

"There is considerable difference between the parties in the distribution of revenue to the various classes of business, intrastate freight and interstate freight, intrastate passenger and interstate passenger, and also a considerable difference as to the assignment of operating expenses to each such class of business, which difference, as respects the operating expenses, is due to the methods of division of the total amount thereof employed by the witness Hillman. As hereinbefore stated, the results obtained by the employment of his methods of division of operating expenses are found not to be correct, fair or just.

If the distribution of the total revenue to such various classes of business be made as the defendants' exhibits indicate, and the division of the operating expenses between the freight department and the passenger department be made as hereinbefore found to be fair and just, and the division of freight cost between the intrastate business and the interstate business be made as hereinbefore found to be fair and just, and the division of passenger cost between the intrastate business and the interstate business be made as hereinbefore found to be just and fair, the result would not affect the final decree recommended to be entered.

Apportionment of Value Between Freight and Passenger Business and Between Intrastate and Interstate Business of Each.

Minneapolis & St. Louis Case.

Total value of the property of the Minneapolis & St. Louis Company used in the fiscal year ending June 30, 1907, in the conduct of its business in Minnesota, was, as hereinbefore found, $21,608,464.

Such total value may be fairly and justly apportioned between the freight business and the passenger business on the gross earnings basis—that is, assign to each such percentage of total value as the amount of the gross earnings of each bears to the total gross earnings of both. The value so apportioned to the freight and passenger business may in similar manner be justly and fairly divided on the gross earnings basis between the intrastate business and the interstate business of each.

A statement of freight and passenger revenues in Minnesota, for the year ending June 30, 1907, divided between Minnesota intrastate business and Minnesota interstate business, is as follows:

	Minnesota Intrastate.	Minnesota Interstate.	Total.
Freight revenue	$534,696.66	$1,180,155.91	$1,714,852.57
Passenger revenue	352,008.52	298,258.28	650,266.80
	$856,705.18	$1,478,414.19	$2,365,119.37
Per cent	37.49%	62.51%	100%

(Ex. 33—Scott, Section D.)

The following is a summary of the apportionment of total value to the different classes of business in Minnesota:

Summary of Apportionment of Total Value to the Different Classes of Business in Minnesota.

Total value of property used in transportation business in Minnesota, for the fiscal year ending June 30, 1907		$21,608,464.00
Total value apportioned to freight business, 72.51%, or..	$15,668,297.24	
Total value apportioned to passenger business, 27.49% or...	5,940,166.76	
Total.....		$21,608,464.00
Assign to intrastate freight business 31.180% of total value apportioned to freight business.....		$ 4,885,673.71
Assign to interstate freight business 68.820% of total value apportioned to freight business.....		10,782,623.53
Assign to intrastate passenger business in Minnesota 54.13% of the total value assigned to passenger business		3,215,339.44
Assign to interstate passenger business in Minnesota 45.87% of total value assigned to passenger business in Minnesota		2,724,827.32
		$21,608,464.00

If such valuation were to be apportioned on the same basis but according to the figures shown by defendants' evidence (see Ex. L—Hillman, Table 14), the final decision would not be changed.

To yield an annual return of 7% upon the value so assigned, there would be required for intrastate freight..	$ 341,997.15
For interstate freight.....	754,783.64
For intrastate passenger.....	225,073.76
For interstate passenger.....	190,737.91
Total.....	$ 1,512,592.48

The defendants introduced testimony and exhibits which show what they claim to have been the net income (after paying only operating expenses and taxes), derived from the intrastate freight business, and from the intrastate passenger business as follows:

Total income, all sources, applicable to intrastate freight ..... (Defendants' Ex. L—Hillman, Table 12.)	$225,890.00
Total income, all sources, applicable to intrastate passenger ..... (Defendants' Ex. L—Hillman, Table 13.)	148,721.70

Each of the amounts so claimed by defendants is in excess of the actual net income from all sources, derived from such classes of business respectively, over and above operating expenses and taxes. The method employed by the defendants for the ascertainment of the amount of operating expenses chargeable to each such class of business was not correct, fair or just, and resulted in assigning to each such class of business an amount much less than was in fact expended by said Company in said year in the conduct thereof.

* * * * * * * *

The total net earnings of said Company for said year 1907 in Minnesota, from all sources, which involved the use of the property included in such valuation was $895,977.66, sufficient to yield an annual income upon such value of $21,608,464 of only 4.14%. (See Ex. 33—Scott.)

The cost of conducting each class of the intrastate business covered by the rates complained of is greater in proportion to the revenue derived from each such class of business than was the cost of conducting the corresponding class of interstate business of said Company in said year in said state, and the amount of net income derived from each such class of intrastate business is less than sufficient to yield an annual return of 4.14% upon the proportion of the value of the whole property which was used in the conduct of each such class of business, and which is properly chargeable thereto.

Net Earnings.

(Entire railway system of said Company.)

The net earnings, after paying only operating expenses and taxes, from 1903 to 1909, both inclusive, were as follows:

Net Earnings.

1903.	1904.	
$1,398,895.30	$1,229,524.49	
1905.	1906.	1907.
$1,277,870.96	$1,511,961.99	$1,419,822.54
1908.	1909.	
$1,220,862.21	$1,286,494.08	

(Ex. 33—Scott.)

Net Earnings.

(Minnesota.)

The net earnings of said Company, after paying only operating expenses and taxes, on all of its business in Minnesota, from all sources, involving any use of the property valued herein, from 1903 to 1909, both inclusive, were as follows:

Net Earnings.

1903.	1904.	
$1,222,941.77	$1,052,478.74	
1905.	1906.	1907.
$1,054,853.35	$1,109,260.56	$895,977.66
1908.	1909.	
$742,377.46	$794,472.58"	

Note.

Complainants' Ex. 33 Scott, Section B—6 M. & St. L.

"Interest Charges.

As of date April 30, 1908, the annual interest charges which said Company was and is subject to pay on account of bonds was $952,583.

If this be apportioned among states on the basis of gross earnings, the amount chargeable to each state is as follows:

Minnesota	$690,517
Iowa	244,120
South Dakota	17,946
	$952,583

(Exhibit 6—Scott.)

The par value of such bonds on said date was $20,011,800. (Exhibit 6—Scott.)

Effect of Rates Complained of Upon Revenue.

Merchandise Rates.

If the merchandise rates complained of had been in effect during the year ending June 30, 1907, the Minnesota intrastate revenue of the Minneapolis & St. Louis Company derived from the business covered by such rates would have been reduced $33,367.30, more than 19½% of the revenue derived from such business. (Ex. 16—Scott and Ex. 21—Tittemore.)

Passenger Business.

On the volume of the passenger service rendered by the Minneapolis & St. Louis Company within the state of Minnesota for the year ending June 30, 1906—the last complete fiscal year during which the basis of maximum fare of three cents per mile was applied by said Company—the losses in revenue which would have resulted had the two-cent per mile passenger law complained of been in effect, are as follows:

Intrastate passenger business in Minnesota..	$80,452
Interstate passenger business in Minnesota..	66,372
	$146,824

(See Ex. 13—Scott.)

The volume of passenger service rendered during the fiscal year 1907 was greater than the preceding fiscal year. (Ex. 12—Scott, Ex. 33—Scott.)

Commodities Chapter 232.

As hereinbefore stated, the Northern Pacific Company, the Great Northern Company and the Soo Company reduced rates in the autumn of 1906, in Minnesota, on coal and grain."

Note.

A. G. Maguire— 3 G. N. 800.

Complainant's Exhibits 40 and 41 Maguire. (6 G. N.)

F. H. Parker— 2 G. N. 624.

Complainant's Exhibits 21 to 28 Parker, (6 G. N.).

W. G. Johnson— 4 N. P. 1688.

Complainant's Ex. 62A-62D, Johnson, (10 N. P.).

"By reason of these reductions the Minneapolis & St. Louis Company was compelled to make certain reductions on coal and grain on its line with respect to such business, intrastate, in Minnesota, and certain of its corresponding interstate business."

Note.

J. N. Tittemore— 2 M. & St. L., 93-112.
3 M. & St. L., 847-867.

Complainant's Ex. 14 and 14A, Tittemore, (6 M. & St. L.).

"Immediately prior to the commencement of these suits the Minneapolis & St. Louis Company, intending to obey the law and apply the rates prescribed in Chapter 232, prepared certain tariffs covering the commodities described in said Chapter 232, which tariffs with respect to intrastate business were as high as said Company could maintain under the act, and which interstate tariffs were as high as said Company could maintain and comply with the provisions of said act with respect to such intrastate business.

On the volume of business in the transportation of commodities covered by said act, of said Company,

moved during the fiscal year ending June 30, 1906, the revenues of said Company—if the aforesaid tariffs required and made necessary by the provisions of said act, had been in force, would have been decreased below what the same would have been had the rates remained the same as they were in fact after the reductions in the autumn of 1906, made necessary by reason of the reductions in the northern lines hereinbefore referred to, as follows:

Minnesota intrastate,
$51,802.22, more than 14% of revenue affected.
Minnesota interstate,
$66,842,46, more than 16% of revenue affected.
Other interstate,
$26,847.55, more than 11% of business affected.

Making a total of,
$145,492.23, more than 14% of business affected.

Comparing the revenue on the commodities described in said act, which would have been received on the business of the fiscal year ending June 30, 1906, under the rates prescribed in said act, with revenue which would have been received on the same business if the rates had remained the same throughout the year as they were prior to the reductions made as aforesaid in the autumn of that year, the resulting loss would have been as follows:

Minnesota intrastate,
$70,760.83, more than 19% of revenue affected.
Minnesota interstate,
$82,101.42, more than 19% of revenue affected.
Other interstate,
$26,847.55, more than 11% of revenue affected.

Total,
$179,709.80, more than 17% of revenue affected.
(See Ex. 14-A—Tittemore.)

Revenue Derived from Operation, Fiscal Year Ending June 30, 1907.

(Exhibit 33—Scott, Sec. D, Exhibit M-Hillman.)

	Intrastate	Interstate	Total
Freight revenue (transportation)	$534,696.66 31.18%	$1,180,155.91 68.82%	$1,714,852.57
Miscellaneous (consisting of switching, demurrage, storage, etc.)	1,151.55	2,541.67	3,693.22
	$535,848.21	$1,182,697.58	
Passenger revenue	$352,008.52 54.13%	$298,258.28 45.87%	$650,266.80
Miscellaneous (consisting of mail, express, excess baggage, etc.)	60,474.43	51,246.29	111,720.72
	$412,482.95	$349,504.57	$2,480,533.31

(Division of Miscellaneous between intra and inter is on gross revenue basis.)

Operating expenses in the state.....$1,554,595.49
(Exhibit 33—Scott.)

Divided between freight and passenger as follows:

Passenger	523,375.97	
Freight	1,031,219.52	$1,554,595.49

(Exhibit 33—Scott, Sec. B and p 1175 P. R. et seq.)

* Dividing freight operating expenses—$1,031,219.52 —on "straight revenue basis":

Assigns 31.18% = $321,534.25 to intrastate freight,
Assigns 68.82% = $709,685.27 to interstate freight.

Dividing passenger operating expenses, $523,375.97 in like manner,

Assigns 54.13% = $283,303.41 to intrastate passenger,
Assigns 45.87% = $240,072.56 to interstate passenger.

Taxes paid in Minnesota, fiscal year ending June 30, 1907, $124,474.58, (Ex. 33—Scott, Sec. B), apportioned to the various classes of business on revenue basis.

Assigns 22.61% thereof = $28,143.70 to intrastate freight,
Assigns 49.90% thereof = $62,112.81 to interstate freight,
Assigns 14.88% thereof = $18,521.77 to intrastate passenger,
Assigns 12.61% thereof = $15,696.24 to interstate passenger.

Adding operating expenses assigned to each such class of business to taxes assigned to each such class of business, and subtracting the sum from the foregoing gross earnings from operation of each such class of revenue, and we have the following results:

Intrastate freight, net operating revenue less operating expenses and taxes..... $186,170.26
Interstate freight, net operating revenue less operating expenses and taxes..... 410,899.50

Intrastate passenger, net operating revenue less operating expenses and taxes.. 110,657.77
Interstate passenger, net operating revenue less operating expenses and taxes.. 93,735.77

Total net operating revenue..... $801,463.30
less taxes (stated in Ex. 33—Scott earnings over expenses and taxes.)

In addition to the earnings aforesaid the Company received in Minnesota in said year from use of its property certain "other income," being net items aggregating $94,514.42, (Ex. 33—Scott, Sec. B), which, distributed on the revenue basis,

Assigns 22.61% or $21,369.71 to intrastate freight,
Assigns 49.90% or $47,162.69 to interstate freight,
Assigns 14.88% or $14,063.74 to intrastate passenger,
Assigns 12.61% or $11,918.26 to interstate passenger.

Adding $21,369.71 (other income assigned to intrastate freight) to $186,170.26 (earnings over expenses and taxes) we have $207,539.97.

The commodity rates complained of were enjoined. Had the same been in effect intrastate freight revenue would have been decreased on that account at least $51,802.22. (See Ex. 14-A—Tittemore.)

The class rates complained of were applied November 15, 1906. Had the same been in effect during the whole of the fiscal year the revenue of the Company would have been decreased on that account 9/24 multiplied by $33,367.30 = $12,512.74 (see Exhibit 15—Scott), making the total reduction of intrastate revenue on account of the rates complained of $51,802.22 plus $12,512.74 = $64,314.96, which subtracted from $207,539.97 leaves $143,225.01, sufficient to pay an annual return of 2.93% upon $4,885,673.00, proportion of value assigned to intrastate freight.

The net earnings of the intrastate passenger business over expenses and taxes, $110,657.77 plus $14,063.74, the intrastate passenger proportion of other income = $124,721.51, the total net intrastate passenger income from all sources involving any use of the property valued.

The passenger rates complained of were first applied May 1, 1907. If the same had been in effect during the whole of such fiscal year the intrastate passenger revenue would have been decreased 5/6 of $80,452.00, or $67,043.34, which subtracted from $124,721.51, leaves $57,678.17, sufficient to yield only 1.79% on $3,215,339.00, value assigned to intrastate passenger business.

The total net intrastate income, freight and pas-

senger, all sources, involving any use of the property,

Intrastate freight	$143,225.01
Intrastate passenger	57,678.17
Total	$200,903.18

divided by $4,885,673.00, intrastate freight value plus $3,215,339.00, intrastate passenger value, or $8,101,012.00 = 2.47% return derived from total intrastate business on total valuation of property assigned thereto.

Dividing the freight operating expenses and the passenger operating expenses of Minnesota between intrastate and interstate business, respectively, on the straight revenue basis, as aforesaid, does not assign to either class of such intrastate business the full amount of operating expenses which was actually expended in the conduct thereof; and consequently the rates of return on value 2.93% for intrastate freight and 1.79% for intrastate passenger, and 2.47% for total intrastate —freight and passenger—are in excess of the actual returns respectively which would have been earned if the rates complained of had been in effect during the whole of such fiscal year.

It appears from the foregoing facts, in these three cases and the Master finds that for the two years next prior to July 1, 1908, in these three cases the revenue derived by the said defendant railway companies and each of them from the property thereof devoted to the public use in the operation of their respective lines of railway and the conduct of their business as common carriers of passenger and freight within and local to the State of Minnesota, were and that they still are inadequate and insufficient compensation for the property so used and the service rendered, and that the

aforesaid rates prescribed by the Orders of the Railroad & Warehouse Commission and the Acts of the legislature were and still are unreasonably low, unjust and confiscatory, and, in the immediate future and until there shall be very material changes in existing conditions not likely soon to occur, they will continue so to be, and that the enforcement of said orders and acts should be enjoined and restrained, as well because they are unreasonably low and confiscatory as because they constitute a burden upon and an interference with and a regulation of interstate commerce, as has been hereinbefore found and determined.

XVIII.

Express Business.

The relation of the express companies, doing business over the Northern Pacific Company's and Great Northern Company's respective lines of railway, to the said respective companies ought not to be passed over without mention. It appears that each railroad company owns all the stock of the express company operating on its line and that the express business is conducted under a contract between the express company and the railway company whereby the latter receives certain fixed compensation for the privileges granted to the express company, which compensation, of course, is included in the operating revenue of the railway company. But the express company pays very substantial dividends on its capital stock which is received by the railway company but not included by it in such operating revenue, and there is considerable force in defendants' contention that such dividends

should be considered as operating revenue. It must be remembered, however, that the business of an express company is in many respects of a very different character to that of a railway company, and its scope is much broader than that of an ordinary common carrier. The business of such express company is to assemble, insure, especially care for and speedily forward to and distribute at point of destination all articles of transportation committed to its charge, including the issuing of express money orders, making collections and other like kinds of service required in commercial affairs. Manifestly such services in general are widely different from those usually performed by a railway company, and suggest the propriety if not the necessity of a separate and independent agent for their performance. Since, however, by ownership of stock the railway company receives the net revenue of the express company, and does not include it as a revenue derived from the operation of its own business, as indeed it is not, it is important that the public who are directly interested in the operating revenue of the railway company, derived as it is from rates paid by them, should be protected against any unfair contract between the railway company and the express company controlled by it whereby the latter may not be accorded full value for services rendered, and the burden of establishing the fairness of such contract whenever called in question is upon the railway company. In the instant cases, however, the evidence does not justify a finding that the railway companies in question do not receive full and fair compensation for services rendered to the express companies, and they are, therefore, not required to include express dividends in their operating revenue."

Note.

Northern Express Co.—
8 N. P. 4251.
Complainant's Exhibit 80-B, Elliott, (10 N. P.).
Annual Report to State of Minnesota, 1908, (p. 45), (Vol. 1 N. P.).

Great Northern Express Co.—
4 G. N. 1878.
Complainant's Exhibit 49, Martin, (6 G. N.).

XIX.

"Conclusion.

The foregoing findings of fact and conclusions of law the Master deems sufficient to cover all the issues necessary for final judgment in these three cases. It is needless to say that they have been thoroughly and carefully tried and with marked ability on behalf of both parties, and nothing has been left undone to fully apprise the Court of every fact necessary to reach a just decision, and to this end counsel on both sides have given their undivided attention in the presentation of testimony and preparation of briefs, and in oral argument, for a period of nearly two and a half years, time as the Master believes well spent in the ultimate determination of questions of great national as well as of great commercial importance.

In addition to the testimony reported to the Court, it has been agreed between the parties that reference might be made to the reports of the several companies annually made to the Railroad & Warehouse Commission without a transcription thereof and its inclusion with the other testimony herewith reported to the

Court, and both parties have made recourse thereto in preparing exhibits in evidence and in submission of the causes for decision.

In obedience to the order of Court the Master submits forms of decree which he recommends to be entered in the three cases, and the same are hereto annexed and made part of this report.

All of which is respectfully submitted,

September 21, 1910.

CHAS. E. OTIS,

Special Master."